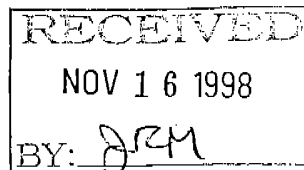


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November 15, 1998

Bruce Halstead
U.S. Fish & Wildlife Service
1125 16th Street, Room 209
Arcata, CA 95521

John Munn
California Department of Forestry
1416 Ninth Street, Room 1516-4A
Sacramento, CA 95814

Re: Permit numbers PRT-828950 and 1157 and SYP 96-002

Dear Mr. Halstead and Mr. Munn:

This office represents the Sierra Club and the Environmental Protection Information Center ("EPIC") with respect to the proposed Pacific Lumber Company Habitat Conservation Plan (HCP) and incidental take permit (ITP) applications under §10 of the federal Endangered Species Act, California Fish and Game Code §§ 2081, 2090, and with respect to the Sustained Yield Plan under the California Forest Practice Rules, Article 6.75 (hereinafter the "HCP/SYP"), as well as the joint draft Environmental Impact Statement/Environmental Impact Report (hereinafter the "EIS/EIR") prepared for this project. I am writing to submit comments regarding these matters on behalf of the Sierra Club and EPIC. These comments and the evidence submitted herewith are meant to incorporate and supplement other comments submitted by members of the public including the Sierra Club and EPIC.

I. Incomplete Documentation

PL and the Services have failed to provide numerous documents requested by the Sierra Club & EPIC relative to this HCP/SYP application. The actions of the federal agencies have resulted in the public, including the Sierra Club and EPIC, being deprived of information essential to analyzing and commenting on the draft SYP/HCP. The information which the federal agencies are withholding include, *inter alia*, 1) Map 7 (stream type protection zones) of Volume V of the draft SYP/HCP is incomplete; 2) All Exhibits referenced in the draft Implementation Agreement (HCP Vol. VI(D)); and 3) the Pacific Watershed Associates' Sediment Source Investigation for the Lower Eel River (1998a) and also the Sediment Source Investigation and Sediment Reduction Plan for the Bear Creek Watershed (1998b) (HCP, Vol. IV, Part D, Section 1, p.4.).

In addition, the federal agencies have been extremely dilatory in responding to FOIA requests. NMFS has failed to provide any response to FOIAs filed March 26, 1998, May 29, 1998, July 24, 1998 and August 4, 1998, despite the fact that the proper administrative appeals have been filed. Similarly, the FWS has failed to make any response to FOIAs filed May 29, 1998, July 28,

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1997, and May 5, 1997, despite the fact that the proper administrative appeals have been filed. Also, the U.S. Forest Service has denied documents originally requested on May 16, 1997, and has only provided a limited amount of requested material over a year later on May 12, 1998.

Failure to provide these documents violates ESA §10(c) and FOIA. Again, the public cannot effectively review the scientific basis for this HCP/SYP without these documents being made available for review and comment. These documents may have been relied upon to reach unsupported assumptions or conclusions.

Indeed, the permitting agencies: FWS, NMFS, DFG, and CDF, are at a similar disadvantage. If you have not received all of these documents, you cannot determine whether this HCP/SYP is Based on the "best scientific and commercial evidence available" as required by §7 of the ESA, nor reach determinations of insignificance in the EIS pursuant to NEPA and CEQA. In addition, the agencies should have received specific, detailed information regarding the costs of particular minimization and mitigation measures, as well as the financial circumstances of the permit applicant to support PL's claims that the proposed mitigation is the maximum extent practicable. See 8/8/97 letter from Sierra Club/EPIC, included herein.

Sierra Club/EPIC request that copies of all such documents be provided, and that the public comment period be extended for 30 days after Sierra Club/EPIC's receipt of these studies. Finally if members of the public requested a full EIS/EIR and HCP/SYP and were only sent summaries, the comment period should be extended to allow the public time to review and comment on these documents.

II. Failure to Adequately Describe Environmental Setting

The HCP/SYP and the EIS/EIR fails to present a full description of the environmental setting of the project as required by CEQA and NEPA. Examples include, without limitation:

(1) Failure to describe how much of the "buffering second growth timber is already 60'-100' tall." (HCP IV(B)(1), p.2)

(2) Failure to survey to determine how much of the residual old-growth redwood is suitable or potentially suitable habitat for murrelets. The EIS indicates that at least 45% of the potentially suitable murrelet habitat has not been surveyed. (EIS p.3.10-125) The EIS alternatively states that the amount of unsurveyed acreage equals 7,840 acres of unentered and residual old-growth redwood (EIS Table N.1-1.)

III. Failure to present an accurate, stable and finite project description

The EIS/EIR does not contain or evaluate an accurate project description in violation of NEPA, CEQA and the ESA. See e.g. County of Inyo v. City of Los Angeles (1977) 71 Cal.App.3d 185, 193 ("An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR"). Examples include, without limitation:

(1) The HCP fails to state whether Owl Creek grove and/or Grizzly Creek grove will be harvested. (HCP p. 31)

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(2) Failure to describe the project as modified by the terms of the Implementation Agreement (IA)

(3) The IA inadequately describes the project. Examples include without limitation: reference to exhibits which are not included for public review and analysis, reference to maps rather than legal descriptions of the MMCAs and the plan area, vague and inadequate definitions of "Covered Activities", "Operating Conservation Program", "Species" affected by the permit, and "restrictions and conditions" of the MMCA Conservation Activities, etc. See Comments on IA attached hereto.

(4) The EIS provides widely divergent estimates of the acreage of residual and unentered old-growth which will be harvested and preserved.

(5) The EIS fails to include a stable and finite project description in light of AB1986, including *inter alia*, a prohibition on timber harvesting, salvage logging and other detrimental activities within the MMCAs for the life of the permit, as well as a 5-year moratorium on such activities within the Grizzly Creek MMCA.

IV. Inadequate Analysis of Proposed Mitigations

(1) The EIS/EIR avoids any analysis of mitigations. EIS p. 3.1-130 states it is summarizing the mitigation measures and then references "further detail" in Appendix Table M-2. However, this Table is similarly lacking in any analysis. Therefore, the EIS/EIR is entirely lacking any analysis of how the MMCAs, vegetative buffers, RMZs or other "management restrictions" will mitigate the admitted short term significant adverse impacts or the long-term significant adverse impacts to murrelets. See also comments on Mitigation to Maximum Extent Practicable, infra, which are incorporated herein by reference.

(2) There is no analysis of how providing 421 acres of buffer (EIS/EIR Appendix N2, Table 1A) will mitigate for taking 8,823 acres of old-growth redwood and at least 251 murrelets.

(3) The EIS/EIR conclusion that significant impacts will be mitigated is not supported by the evidence. The creation of blocks of habitat in the long-term will not mitigate this "take" because of the current bottleneck in available murrelet habitat and rapidly declining murrelet populations.

(4) Short-term significant adverse impacts are not mitigated by the long-term potential benefits of the HCP.

(5) The HCP claims that the "mature forest connectivity along streams provided in the aquatics conservation strategy under this plan may also be beneficial for murrelets as they fly between the ocean and nesting habitat." However, neither the EIS/EIR nor the HCP/SYP provide any analysis of how this would mitigate significant adverse impacts or provide purported benefits. (HCP Vol. IV(B)(1), p26.)

(6) No analysis of why effectiveness monitoring is to be performed only inside the MMCAs, particularly where at least 45% of potentially suitable murrelet habitat on PL's lands is currently unsurveyed. The effectiveness monitoring is suspect as to its reliability given that it is to be conducted by PL or its agents. (HCP, Vol. IV(B)(1), p. 39-41.)

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(7) The draft EIR fails to comply with Pub. Res. Code 21081.6.

(8) The HCP claims that "habitat quality of the reserved residual timber [will improve] over time" - without even explaining whether the period of time is 50 years or 250 years or how this improvement will mitigate admitted significant adverse impacts to the murrelet over the next 50-100 year survival bottleneck period.

(9) There is no analysis of how logging with 300 foot buffer will "enhance late seral characteristics" as claimed by the HCP.

(10) The HCP/SYP includes numerous provisions requiring post-approval studies to develop mitigation measures necessary to reduce or avoid significant adverse environmental impacts, including impacts to endangered or threatened species, in violation of CEQA (Sundstrom v. County of Mendocino (1988) 202 Cal. App.3d 296, ___) and § 7 of the ESA (Conner v. Burford, 848 F. 2d 1441, 1454-57 (9th Cir.1988), cert. denied 489 U.S. 1012) and rendering compliance with § 10 of the ESA impossible. Examples include, without limitation:

- (A) thinning within MMCAs on a case by case basis, as provided in IA §3.1.1(b)
- (B) effectiveness monitoring to be designed and implemented after ITP approval. No criteria or performance standards are included. (HCP, Vol. IV(B)(1), p. 39-41.)
- (C) References in the IA, including without limitation:
 - the Fire Management Plan referenced at IA §3.1.1(a),
 - impacts as a result of take on northern spotted owls referenced at IA §5.2(a),
 - future watershed analysis referenced at IA § 3.1.3.1(a).

(11) The EIS omits analysis of how the short term direct and indirect effects would be mitigated in the long term to less than significant. (EIS p. 3.10-123.)

V. Conclusions Reached Are Unsupported by Substantial Evidence

(1) The HCP statement that "lower density residual is generally believed to be lower quality habitat, it should have a lower probability of occupancy, and its harvest should result in a disproportionately lower estimate of take" is unsupported by the evidence. HCP IV(B1), p. 2.

(2) The HCP statement that "Under this HCP, PALCO will protect all known active nests, and will monitor their success" is unsupported by the evidence. HCP IV(B1), p. 41.

(3) Claims that forest once cut will provide murrelet protection at the end of the term of the permit are unsupported by Murrelet Critical Habitat Designation which found that "Forests providing suitable nesting habitat and nest trees generally require **200 to 250 years** to develop characteristics that supply adequate nest platforms for marbled murrelets." 61 FR 26262.

(4) Surveys necessary to evaluate impacts of the project to murrelets have not been conducted, therefore the conclusion of insignificant long-term impact is not substantiated.

(5) The HCP claim that "the preservation of the Headwaters Reserve .. is the most important murrelet conservation measure in the HCP" is rejected by the federal agencies.

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(6) The HCP/SYP and EIS/EIR statements regarding mitigations are also unsupported for all the reasons stated below under Section entitled "Mitigation to the Maximum Extent Practicable."

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VI. Inadequate Analysis of Significant Adverse Environmental Impacts

An analysis of impacts likely to result from the project is required pursuant to CEQA, NEPA, the Forest Practice Rules for SYPs, and under ESA §10(a)(2)(A)(i). Neither the HCP/SYP nor the EIS/EIR meet this standards. Examples include, but are not limited to the following:

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(1) There is no analysis of the impacts which result from an ITP issued for a 50 year period, versus a shorter or longer time period.

(2) There is no analysis of the impacts which may resulting from the failure to survey for murrelet occupancy in areas planned to be logged. The underlying analysis of murrelet populations, mitigation measures, and the jeopardy determination are all compromised by faulty and unreliable estimates and presumptions. The agencies can't hide behind their failure to gather relevant data.

(3) The impact analysis uses an arbitrary and inappropriate time frame (*i.e.* finding admitted adverse "short term" impacts to be insignificant because "long term" impacts after 50 years will be insignificant) in violation of 50 CFR § 1502.27(a) and (b)(7).

The murrelet analysis (Chapter 3.10) is based on the premise that the Headwaters project would be environmentally beneficial in the long term with respect to murrelets. EIS/EIR analyses concede that these resources would be adversely affected in the short term, but contends they will be beneficially affected in the long-term. The analysis fails to address actual potential losses of murrelets, murrelet habitat and murrelet reproductive success in the short-term, the most significant period during which survival is highly questionable.

(4) The EIS does not analyze the significance of continuing or exacerbating existing significant adverse effect for the next 50-100 years, particularly in regards to reproductive success. (See e.g. Nelson comments and Carter comments, submitted herewith.)

The HCP and EIS ignore the absolutely fundamental issue of whether there will be any murrelets left in the MMCAs on PL's land to benefit from any purported long term beneficial effects of this project 50 years from now.

(5) The impact analysis uses an arbitrary and inappropriate baseline to represent the current environmental setting (*i.e.* Baselines used are extensions of current logging practices into the future, rather than existing on-the-ground conditions in the environment). Nowhere does the EIR use as a Baseline for evaluating the significance of impacts the existing environmental conditions projected into the future. The no project alternative does not do so, nor do the individual impact analyses for Marbled Murrelets. Baselines used appear to be extensions of current logging practices into the future (only considering Forest Practice Rules, and not the §9 prohibitions of the ESA), as opposed to existing on-the-ground conditions (Baselines used in the assessment are not specifically called out in the text).

(6) The impact analysis fails to analyze the significance of adverse impacts of the actual project - *i.e.* logging under the HCP/SYP.

(7) The impact analysis fails to analyze the significance of adverse impacts of the project in both a regional and local context as required by 50 CFR § 1508.27(a).

(8) The impact analysis fails to analyze the project as defined and modified by the Implementation Agreement (IA). The IA contains numerous provisions of the project which are mentioned nowhere else. Yet the EIS/EIR does not even mention the IA. Failure to analyze the whole of the project is a fatal flaw in this analysis.

(9) All methods chosen to assess impacts to murrelets focus exclusively on impact to habitat and avoid any description of impact to species. In particular, Table 4 referenced on HCP Vol. IV(B)(1) p. 9 does not explain the factors and assumptions underlying the range of estimates.

(10) The impact analysis fails to describe or analyze the impacts likely to result from activities within the MMCAs. **Note:** *Subsequent actions below will not entail further NEPA/CEQA compliance pursuant to IA p.18.* There is absolutely no analysis of the impact of any of the following on marbled murrelets or other species:

1. Rock and gravel mining in Allen Creek (IA p.16). Blasting is allowed to occur from March 25th to September 14. Excavation, drilling, screening, loading and related activities are permitted throughout the year. (HCP IV (B1), p. 35).

2. Up to 4 acres may be cleared within each MMCA grove for operation of existing as well as new "borrow pits." (IA p.16; see also HCP IV(B1), p34 which says that trees greater than 12" to be so removed. It is unclear whether any seasonal restriction will apply.

3. Remarkably, hunting, including firearm discharge, will be allowed in the MMCAs between September 16 and March 23 (IA, p.17.)

4. Removal of trees or salvage to permit road use & maintenance & storm proofing (IA p.16; see also HCP IV(B1), p.34.)

5. Fuel removal within old growth residual stands and 2nd growth stands. It is unclear whether any seasonal restriction will apply.

6. Precommercial thinning and commercial thinning of Residual and 2nd growth trees on a case by case basis.

7. Existing, active and previously used haul roads within MMCAs may be used or maintained. It is unclear whether any seasonal restriction will apply.

8. New Roads are Proposed in LNF Elk MMCA and Grizzly Ck complex MMCA (See maps at HCP Vol. IV(B8) - 1st and last map)

9. A truncated seasonal restriction of May 1 to August 10 for timber falling in Owl Creek or Grizzly Creek (HCP Vol. IV(B1), pg. 33)

(11) The analysis of impacts to murrelets outside the MMCAs is inadequate.

(12) There is absolutely no analysis of impact to murrelets as a result of disturbance. Take through harassment includes disruption of important behavioral characteristics and yet take is assumed to be limited solely to direct killing of birds as a result of cutting down their nest trees. See comments of Nelson; see also, for example Biological Opinions #1-1-94-F-66 and 1-7-96-F-84 and subsequent reinitiations of consultation.

(13) The HCP/SYP includes numerous provisions requiring post-approval federal agency participation, oversight or approval, without either analysis or assurances that the agencies will have the resources to fulfill those functions. Examples include, without limitation, the Services'

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claim that they have resources that can be utilized to provide additional protection to Covered Species in event of finding of Unforeseen Circumstances. (IA §6.1.6.6.)

(14) Figure 5 does not demonstrate the results of murrelet surveys undertaken throughout the plan area over the last 5 years. Figure provides no analysis. HCP IV(B1) p. 12-13.

(15) The HCP relies upon the assertion that "much of the unsuitable critical habitat in federal ownership is anticipated to become suitable habitat over time." (HCP Vol. IV(B1), p.18.) Yet by failing to state over what period of time the HCP prevents any analysis of the impacts. The Murrelet Critical Habitat designation states that 200-250 years are needed for habitat to become suitable to murrelets.

(16) The HCP states that: "The overall effect of the HCP on the marbled murrelet is to protect in perpetuity the most important murrelet habitat on the Company's lands (the Headwaters Reserve), and to protect a large majority of high quality habitat on Company lands and to enhance the probability of survival of the murrelet for the next 50 years." HCP Vol.IV(B)(1) p. 7.

This statement falls short of the statutory mandates to 1) not appreciably reduce the likelihood of survival and recovery, 2) minimize and mitigate to the maximum extent practicable and 3) avoid significant adverse impacts.

(17) The EIS fails to analyze the role of residual to murrelet nest success. The EIS has ignored the position of the Pacific Seabird Group on the role residual redwood plays to murrelet survival and recovery.

(18) There is no analysis provided to conclude that most of the designated critical habitat on PL and Elk River Timber Company lands does not contain the requisite critical habitat constituent elements. There is no breakdown of this designated critical habitat acreage by either of the two listed constituent elements, and the land has not been properly surveyed. (EIS p. 3.10-49.)

(19) The EIR is missing an analysis of significant impacts given the conflicts of the PL HCP with the Murrelet recovery plan.

It is important to note that Appendix N is not the EIS analysis, but only evidence that the EIS can rely upon.

VII. Cumulative Impacts

The Services have an obligation to analyze cumulative impacts pursuant to NEPA, CEQA and as part of their ESA §7 consultation. Both the EIS/EIR and the HCP/SYP are entirely deficient in this area. Examples include, without limitation:

(1) There is no analysis of the cumulative impact of allowing harvest within 1 or more MMCA groves if the Federal agencies have agreed that the delisting criteria in the "then-existing Murrelet Recovery Plan" have been met.

(2) The cumulative impacts analysis fails to add the incremental impact of this ITP/HCP/SYP to existing significant impacts from past projects.

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(3) The cumulative impacts analysis assumes that minimizing impacts from this ITP/HCP/SYP will avoid significant adverse impacts.

(4) There is no analysis of the cumulative impact of allowing the IA provision that the Wildlife Agencies will not require any further compliance under NEPA or CEQA for MMCA Activities.

(5) There is no analysis of the cumulative impact of the 1997 Kure Oil spill, despite the fact that information regarding this event is in the possession of the Agencies and the USDA Redwood Science Lab.

(6) There is no analysis of the cumulative impact of allowing the "safe harbor" and "no surprises" policies to be applied to this project.

(7) There is no analysis of the cumulative impact of failing to survey thousands of acres of potentially suitable murrelet habitat consistent with the Recovery Plan recommendations.

(8) There is no analysis of the cumulative impact to marbled murrelets of the following foreseeable changes in circumstances:

A) increases in predation. The HCP states (Vol.IV(B1),p. 42) that "marbled murrelet predators ... are associated with human activity," and "the densities of these predators are increasing locally and state-wide."

B) increased take as a result of gill net morality. This is a reasonably foreseeable future event given that it was one of the Bases for listing the murrelet as federally threatened. In addition, numerous Biological Opinions have concluding that take of murrelets is occurring as a result of gillnetting,

C) oil spills and other pollution. Numerous Biological Opinions have concluding that take of murrelets is occurring as a result of oil spills (See BO #1-2-96-F-236, 1-14-97-F-3; 1-3-96-F-324, 1-3-96-F-236, 1-3-93-F-592.)

D) El Nino (See HCP p. 16-17; see also Biological Opinion # 1-7-95-F-278.)

See also, infra, Reasonable Foreseeable Circumstances.

(9) There is no analysis of the cumulative impact of the fact that the murrelet population is declining at a rate greater than 4-7% annually.

(10) There is no analysis of the cumulative impact of the provision which only limits take of northern spotted owl on additional lands during the first 5 years of the Permits, thus allowing the inference that take is permitted where lands are acquired on or after Year 6. See IA §5.2(a).

(11) There is no analysis of the cumulative impact of the pending Arcata Redwood HCP.

(12) There is no analysis of the past, present and reasonably foreseeable impacts of federal actions on federal lands¹ nor as a result of other HCPs, throughout the range of marbled murrelet, northern

¹ Biological Opinion #1-3/7-90- F-2 and subsequent reinitiations of consultation determined jeopardy to murrelets as USFS Section 318 timber sales.

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spotted owl, coho salmon and all other "Covered Species." The 235 Biological Opinions affecting Marbled Murrelet and Northern Spotted Owl summarized by our monitoring project reveal that²:

- Almost 5000 northern spotted owls have been allowed to be "taken", i.e. killed, harmed or harassed by the U.S. Fish & Wildlife Service over the past seven years.
- Take as a result of gill net fishing has resulted in a loss of 185-210 murrelets.
- Approximately 283,839 acres of suitable Northern Spotted Owl nesting, roosting & foraging habitat has been "removed" or destroyed.
- 20,832 acres of suitable marbled murrelet habitat (ancient forest) has been "removed" or destroyed
- 671,305 - 822,885³ acres of Northern Spotted Owl nesting, roosting & foraging habitat has been degraded.
- 51,182 - 144,689 acres of marbled murrelet suitable habitat (ancient forest) has been degraded.
- 1,118,848 - 1,289,773 acres of Northern Spotted Owl suitable habitat has been removed, degraded, or otherwise affected by federal agency action
- 264,737 - 375,374 acres of marbled murrelet suitable habitat has been removed, degraded, or otherwise affected by federal agency action.

(13) There is no analysis of the cumulative impact of all other past, present and reasonably foreseeable future HCPs in the Pacific Northwest. (See "Western Forest HCP Inventory" submitted herewith, as well as the Biological Opinions for the following HCPs: Washington Department of Natural Resources HCP, Elliott State Forest HCP, Simpson Timber Company HCP, Weyerhaeuser-Millicoma Tree Farm HCP, Murray-Pacific - Mineral Tree Farm HCP and Amendment, and Regli Estate HCP.

(14) There is no attempt to analyze the cumulative impact analysis of the admission that "long-term effects post-HCP unknown", referring to a footnote which states, "At the end of the 50-year HCP period (i.e., the long term), effects on Murrelets with respect to fate of MMCAs are unknown". (EIS p. 3.10-91.)

VIII. Inadequate Analysis of Alternatives.

(1) Both CEQA (14 CCR § 15126(d)) and NEPA (at 50 CFR § 1502.14(d)) require that the EIS/EIR analyze a "no project alternative." The CEQA Guidelines require that the "no project" alternative "shall discuss the existing conditions, as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, Based on current plans and consistent with available infrastructure and community services." The primary purpose of the requirement of considering alternatives is to present the relative environmental benefits and costs of the analyzed alternatives in comparison to the proposed project. Kings County Farm Bureau v. City of Hanford, supra, 221 Cal. App. 3d 692, 730-737.

² A summary of each of these Biological Opinions is included herein. These biological opinions originated from FWS Region One (Pacific Northwest). The numbers presented herein may not reflect all of the "take" and loss of suitable habitat to the extent the FOIA response was incomplete.

³ The range given by the numbers reflects the lack of clarity in the estimates provided by the biological opinions themselves.

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The EIS/EIS alternatives discussion fail to do this. Neither the state nor the federal version includes a no project alternative that analyzes "existing conditions", because neither no project alternative consists of "no logging." Consequently, the EIS/EIR fails to provide a comparison of the relative environmental benefits of no logging to the proposed project. Further, the state version of the no project alternative is only a short term projection.

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But the difficulty in specifying future conditions with precision does not excuse the failure to analyze a no project alternative that has a time duration at least as long as the proposed project (i.e. fifty years). The discussion of project alternatives must "contain facts and analysis; not just the agency's bare conclusions or opinions" and must contain "meaningful detail" sufficient to provide the decision maker with enough information to make an informed decision and to enable the public "to understand, evaluate and respond to the agency's conclusions." *Laurel Heights I*, supra, 47 Cal. 3d at 404, 406, 399-407. In sum, the alternatives discussion fails to describe what could be reasonably expected to occur in the future if the HCP/SYP is not approved.

Similar to the defective EIR discussed in *Laurel Heights*, supra, the instant EIR contains "no analysis of any alternative locations" for harvesting that would not have such severe impacts on Marbled Murrelets, (*Id.* at 404; see also *Citizens of Goleta Valley v. Board of Supervisors II* (1989) 216 Cal. App. 3d 48 (EIR must sufficiently inform the public why ostensibly feasible alternative sites were rejected).)

(2) The EIS fails to analysis all feasible Alternatives.

(A) There is no discussion in the EIS of an alternative which would maintain the MMCAs but phase the harvest so that cutting were completed on a slower schedule with the lower quality habitat being cut first, despite the fact that the HCP considers such an alternative. HCP Vol. IV(B1), p. 37.

(B) There is no discussion in the EIS of the reasonable alternatives presented by the USFWS and presented in HCP Vol. IV(B)(13).

(C) There is no discussion in the EIS of implementing a "FEMAT alternative" which would survey before logging and avoid all occupied murrelet sites.

(D) There is no analysis of an alternative permit period. The Elliot State Forest HCP is for only 6 years. See Nelson comments.

(3) Under Alternatives 2 and 4, the EIS fails to discuss whether or not short term indirect effects are adverse or not, and whether they are significant or not. (EIS p. 3.10-123.)

(4) Finally, it is the project proponent's responsibility to provide an adequate discussion of alternatives, and "[t]hat responsibility is not dependent in the first instance on a showing by the public that there are feasible alternatives. If the project proponent concludes that there are no feasible alternatives, it must explain in meaningful detail in the EIR the basis for that conclusion (*Laurel Heights* at 405.)

IX. The HCP Fails to Mitigate and Minimize Impacts to the Maximum Extent Practicable⁴ and Therefore Should Be Rejected

PL has failed to minimize the impact of the take of federally listed species to the maximum extent practicable. In addition, PL has failed to mitigate the impact of the take of federally listed species to the maximum extent practicable. Example include, but are not limited to the following:

(1) PL has made no demonstration of economic feasibility or infeasibility of the project, mitigations, minimizations or alternatives considered. See EPIC/Sierra Club 8/8/97 letter, submitted herewith.

(2) Neither the HCP/SYP nor the EIS/EIR has provided analysis or facts to support the claim that take has been minimized and mitigated to maximum extent practicable. There has been no such analysis or supporting facts regarding each of the following aspects of the project outside the MMCAs:

(A) Harvest of currently occupied habitat and potentially suitable habitat will occur during the nesting season. (HCP Vol. IV(B)(1), p. 32, 35)

(B) Where active nest is discovered, the tree will be cut once the nestling fledges. (Id.)

(C) No buffering or seasonal restrictions will be provided for suitable nesting habitat along the exterior borders of the MMCA groves. (Id.)

(D) A 300 ft vegetative buffer from Suitable Nesting Habitat along 1) the PALCO / Humboldt Redwood State Park boundary and the 2) Grizzly Creek State Park lands along Highway 36. Within this buffer late seral logging will be allowed where selection logging will occur every 20 years, retaining only 240 square foot residual Basal Area. (Id.)

(E) Within 0.25 mile of suitable nesting habitat on public preserves (Grizzly Ck State Park, HRSP and Headwaters Grove) a seasonal restriction of March 24 to September 15 from falling, yarding and log loading. (B1, pg. 32). The seasonal restriction will not preclude maintenance, use and stormproofing of existing roads, "previously used" haul roads and "other facilities."

(3) Neither the HCP/SYP nor the EIS/EIR has provided analysis or facts to support the claim that take has been minimized and mitigated to maximum extent practicable. There has been no such analysis or supporting facts regarding each of the following aspects of the project inside the MMCAs:

(A) Rock and gravel mining in Allen Creek (IA p.16). Blasting allowed to occur from March 25 to September 14. Excavation, drilling, screening, loaded and related activities are permitted throughout the year. (HCP IV(B1), p. 35)

(B) Up to 4 acres cleared within each MMCA grove for operation of existing as well as new "borrow pits" - IA p.16 / (HCP B1, p34 also says not trees greater than 12" to be so removed)

(C) Hunting, including firearm discharge, between September 16 and March 23 - p.17

(D) Removal of trees or salvage to permit road use & maintenance & storm proofing

(E) Fuel removal within Old growth residual stands and 2nd growth stands

(F) Precommercial thinning and commercial thinning of Residual and 2nd growth trees on a case by case basis.

⁴ 40 CFR 1508.20 - Service should explore the specific methods for mitigating adverse impacts in descending priority, by 1) avoiding the impact, 2) minimizing the impact, 3) rectifying the impact, 4) reducing or eliminating the impact and 5) compensating the impact.

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(G) Existing, active and previously used haul roads within MMCAs may be used or maintained.

(H) New Roads are Proposed in LNF Elk MMCA and Grizzly Ck complex MMCA (See maps at HCP Vol. IV(B8))

(I) A truncated seasonal restriction of May 1 to August 10 for timber falling in either Owl or Grizzly Ck MMCA.

(J) Harvest may be allowed within 1 or more MMCA groves if the Federal agencies have agreed that the delisting criteria in the "then-existing Murrelet Recovery Plan" have been met.

(4) Practicable minimization of impact should have included:

(A) Survey for murrelets before logging outside MMCAs. The Northwest Forest Plan and numerous other HCPs, including Elliot State Forest, require such surveys before logging. See Kim Nelson comments.

(B) Avoidance of all occupied murrelet habitat outside MMCAs

(C) Avoidance of harvest during nesting season outside MMCAs

(D) Full seasonal restrictions in Grizzly Ck and Owl Ck groves

(E) Monitoring outside MMCAs. Currently the PL monitoring plan only will look inside the MMCAs.

(F) Permanent protection of all nesting habitat with 1/2 mile circles around all occupied sites as required by Northwest Forest Plan (HCP p. 21) and the Marbled Murrelet critical habitat designation.

(5) The HCP admits that "additional research or survey methods" include radar and telemetry, and yet these are not included in the mitigation measures. (HCP Vol. IV(B1), p. 41)

(6) If, as HCP claims, "inland surveys are not, by themselves, thought to monitor adequately marbled murrelet numbers effectively enough to allow estimates of population trends (HCP Vol. IV(B1) p. 41), why is no at-sea monitoring included as mitigation here.

(7) Reference to the FWS documents submitted herewith reveals that PL did not mitigate to the maximum extent practicable.

(8) The HCP itself reveals that PL didn't attempt to mitigate to the maximum extent practicable but only so that "Alternatives were rejected if they didn't grant" the ability to harvest an equivalent timber value on volume in the lower habitat-value MMCAs. HCP Vol. IV(B1), p. 25.

X. The HCP Fails to Meet the Other 10(a)(2)(B) Criteria and Therefore Should Be Rejected by FWS and NMFS.

(A) Adequate Funding Is Not Ensured

The applicant has not "ensured" that adequate funding will be provided. The phrase in IA §3.3 that "...such funds as may be necessary to fulfill its obligations under the HCP" does not specify the amount or source of such fund, nor what the Service consider "the obligations under the HCP." This omission violates the ESA, NEPA and CEQA. The IA does not describe the funding sources that PALCO will use at Volume I, Part A of the HCP.

For a 50 year permit to kill endangered species, the provision which allows PL to defer demonstrating that it has sufficient funds violates ESA §10(a)(2)(B)(iii).

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The ESA requires a demonstration be made as part of the HCP application that sufficient funds exist to carry out the required mitigation and conservation measures for the life of the permit. \$1.5 million is an arbitrary number and there is no evidence to support a finding that this amount is adequate funding for the plan. Moreover, adequate funding for the plan should be in the form of a bond which control is vested in the Wildlife Agencies for the life of the permit.

Moreover, "a material change in PALCO's funding resources" is a foreseeable change in circumstances which must be analyzed in the EIS/EIR. Also, "A material change in PALCO's funding resources" as "any change in the financial condition of PALCO which will adversely affect PALCO's ability to manage the Covered Lands" is so broad and vague that it is arbitrary and capricious. Moreover, to the extent that this determination may be made by PL, the agencies have abrogated their ESA duties.

(B) PL failed to specify the impacts that will likely result from this HCP

As demonstrated above, PL failed to specify the impacts that will likely result from this plan, making assertions contradicted by all substantial evidence and without the benefit of any supporting analysis. 16 USC §1539(a)(2)(B).

(C) Specification of other measures that the Secretary may require

The HCP is entirely devoid of any specification of other measures that the Secretary may require as necessary and appropriate for purposes of the plan. After negotiating over the terms of the HCP with NMFS and FWS for almost two years, PL was acutely aware of the measures which the Services believed were necessary and appropriate for the HCP. Yet, the applicant entirely omitted even a summary of this information from the HCP submitted for public review. Failure to include this statutorily required information is grounds for rejection of the plan.

XI. Foreseeable Changes in Circumstances

Neither the HCP nor the EIS have included the following as reasonable foreseeable changes in murrelet circumstance:

- A) increases in predation,
- B) net morality,
- C) oil spills and other pollution,
- D) El Nino
- E) Harvest of residual and unentered old growth redwood outside of MMCAs resulting in detrimental effects on murrelets within the MMCAs (HCP Vol. IV(B1), p. 41).
- F) The rate of murrelet population decline increasing (HCP Vol. IV(B1), p. 43).
- G) "A material change in PALCO's funding resources" as described at IA §3.3
- H) Extension of the ITP Boundaries
- I) PL's relinquishment of the permit.
- J) Disposal of lands, including transfer of ownership or control
- K) Harvest allowed within 1 or more MMCA groves if the Federal agencies have agreed that the delisting criteria in the "then-existing Murrelet Recovery Plan" have been met

XII. Approval of the Proposed Permit Will Result in Adverse Modification of Critical habitat

- (1) Federal agencies have a duty pursuant to Section 7(a)(2) not to adversely modify critical habitat. Approval of this proposed ITP will result in adverse modification of the primary constituent elements of murrelet critical habitat in an area that the FWS has already determined is essential to

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ensure adequate habitat quality and distribution. See comments of Harry Carter and S. Kim Nelson on this subject, included herein.

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Within areas essential for successful marbled murrelet nesting, the Service has focused on the following **primary constituent elements**:

- (1) individual trees with potential nesting platforms, and
- (2) forested areas within 0.8 kilometers (0.5 miles) of individual trees with potential nesting platforms, and with a canopy height of at least one-half the site-potential tree height⁵.

This includes all such forest, regardless of contiguity. These primary constituent elements are essential to provide and support suitable nesting habitat for successful reproduction of the marbled murrelet." 61 FR 26264. **"Potential nesting areas** may contain fewer than one suitable nesting tree per acre." 61 FR 26265. "The Service has determined that the physical and biological habitat features (referred to as the **primary constituent elements**) associated with the terrestrial environment that support nesting, roosting, and other normal behaviors are **essential to the conservation** of the marbled murrelet and require special management considerations." 61 FR 26264.

"Known occupied sites may represent only a small portion of the population due to the limited coverage of past survey efforts" and "known occupied sites provide only a partial indication of the areas used by the species." 61 FR 26265 & 26270.

"A designation of critical habitat begins by identifying areas essential to conservation of a species. In determining which areas to designate as critical habitat, the Service considers **those physical and biological features essential to a species' conservation**. 61 FR 26264. The use of the term "conservation" in the definition of critical habitat indicates that its designation would include **habitat essential to a species' eventual recovery and delisting**." 61 FR 26263. Private lands were designated as critical habitat because they provide essential elements and occur where Federal lands are very limited, although habitat availability on private land is typically much more limited than on public lands. These areas include ...nesting habitat and occupied sites for the at-sea murrelet population in the southern portion of the Draft Recovery Plan's proposed Marbled Murrelet Conservation Zone 4 in California, including the Headwaters Forest area." 61 FR 26265-26266. "The Service chose non-Federal lands on the basis of limited amounts of Federal lands in the vicinity that could support a well-distributed population of marbled murrelets and on the basis of the non-Federal land's contribution to recovery." 61 FR 26274.

"The **evaluation** of actions that may affect critical habitat for the marbled murrelet would **consider the effects of a Federal action on any of the factors that were the basis for determining the habitat to be critical, including the primary constituent elements** of potential nest trees and surrounding forest." 61 FR 26271. " **The basis for an adverse modification opinion would be whether a proposed action appreciably reduces the ability of critical habitat to function in achieving the regional conservation zone goals.**" Id. The loss of populations throughout one or more conservation zones, or even a major part of a conservation zone, could lead to genetic and demographic isolation of parts of the population." Id.

⁵ "On a landscape basis, forests with a canopy height of at least one-half the site-potential tree height in proximity to potential nest trees are **likely to contribute** to the conservation of the marbled murrelet. The site-potential tree height is the average maximum height for trees given the local growing conditions, and is Best Available Scientific Evidenced on species-specific site index tables. 61 FR 26264.

(2) Lifting the critical habitat designation from PL lands based on this HCP would be in violation of the ESA and would be arbitrary and capricious.

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(3) It is important to note that avoidance of adverse modification of critical habitat is not mentioned as a PL HCP planning principle. (HCP Vol. IV(B1), p. 23)

XIII. Approval of This Proposed Permit Will Result in Jeopardy to the Marbled Murrelet

(1) Independent murrelet experts have determined that this HCP will appreciably reduce the likelihood of survival and recovery of the marbled murrelet. See comments of Harry Carter and S. Kim Nelson submitted herewith.

SCE-
13

(2) The HCP itself states that "[t]his HCP may not, in and of itself, result in higher breeding success. Few new nesting platforms not now extant can be reliably predicted to develop naturally within the early years of this plan." "Hence we do not expect the number of breeding sites to increase in the early years of this HCP." HCP Vol. IV(B1), p. 41.

(3) This HCP conflicts with the principles established in the FWS' own Marbled Murrelet Recovery Plan, Murrelet Critical Habitat Designation, Consultation Handbook and HCP Handbook.

XIV. The HCP and the FWS' Issuance of the Proposed ITP Will Contradict the Best Available Scientific Evidence

(1) Logging within 1/4 mile of murrelet nests conflicts with the Murrelet critical habitat rule.

SCE-
14

(2) Statements that residual "scattered so that they do not constitute potential habitat for the marbled murrelet" are contradicted by the position of the preeminent murrelet scientific organization, the Pacific Seabird Group (PSG).

(3) PL monitoring plan doesn't conform to the PSG protocol.

(4) Best Available Scientific Evidence disproves the statement that "amount of [murrelet] habitat on HRSP was at least 5,000 acres, and could be as much as 15,000 acres." Similarly, the EIS recitation of the over-estimate by Ralph and Miller (1997) of the total amount of the murrelet habitat in HRSP and percent of murrelets occupying HRSP are both unsubstantiated and not based on the best available scientific evidence. See Nelson comments, submitted herewith.

(5) The EIS does not use best available evidence when it depends on Ralph and Miller (1998) unsubstantiated reports that approximately 31 percent of all occupied detections in the Bioregion came from the Headwaters Forest. (EIS 3.10-45.)

(6) Plans to allow logging during nesting season conflicts with BEST AVAILABLE SCIENTIFIC EVIDENCE and with HCP's (p. 10) own admission that "In California, they estimated that the breeding season lasted approximately 170 days, with incubation beginning at earliest on 24 March, and the last chick leaving the nest on September 9."

(7) The BEST AVAILABLE SCIENTIFIC EVIDENCE contradicts HCP statement (Vol. IV(B1), p. 15) that "It is not expected that this loss will continue; much of the remaining habitat is

now protected on reserves in federal and other lands. It is expected that the majority of marbled murrelets will continue to be protected on these landscapes, under the Northwest Forest Plan (sometimes hereafter referred to as FEMAT) and approved Habitat Conservation Plans.". See Biological Opinions submitted herewith.

SCÉ-
14
CON-

(8) Similarly, contradicted by BEST AVAILABLE SCIENTIFIC EVIDENCE is EIS assertion that "with respect to cumulative impacts...federal and state agencies will avoid cumulative significant long term effects on murrelet populations that could potentially threaten the three -state or zone populations. (EIS p. 3.10-160.) The HCP itself admits that the Northwest Forest Plan will on its face allow loss of 11% of current murrelet nesting habitat (ie only 89% conserved) (HCP p. 21.) Moreover see summary of Biological Opinions submitted herewith and referenced above.

(9) Failure to survey potentially suitable murrelet habitat contradicts BEST AVAILABLE SCIENTIFIC EVIDENCE, including the Marbled Murrelet Recovery Plan.

(10) HCP Statement that "The population is declining at a rate equivalent to 4-6% annually" is contradicted by BEST AVAILABLE SCIENTIFIC EVIDENCE. Population declining at even greater rate. See analysis of Amanda Stanley submitted herewith.

(11) HCP statement (p. 25) that "Harvesting under the MMCA strategy is restricted to the smaller, most-fragmented or already partially harvested old growth and residual areas" is contradicted by App N, p.10 description of fragmentation of contiguous stands.

(12) FWS agency abandoned its earlier positions on murrelets which had been based upon the best available scientific evidence.

(13) The EIS is not based on the best available scientific evidence it quotes Divoky and Horton (for the proposition that "breeding murrelets would typically be expected to disperse within a distance of one km". See Nelson comments, submitted herewith.

XV. Unlawful Delegation of Agency Authority.

Many provisions of the HCP/SYP limit the exercise of discretion by FWS, NMFS and CDFG or otherwise constitute an unlawful delegation of agency authority to PL. Examples include, but are not limited to the following:

SCÉ-
15

- (A) CDF's obligations as defined at IA §2.4
- (B) Removal of trees for road use as defined at IA §3.1.1(a)
- (C) Removal of timber from MMCAs as defined at IA §3.1.1(b)
- (D) Watershed analysis by PL as defined at IA §3.1.3.1(a)
- (E) Determination of material changes in PL's funding resources, IA §3.3
- (F) Annual Report provision for limiting certification, IA §3.4.2
- (G) PL's consent for additional mitigation or changed circumstances, IA §6.1.6.3 - 6.1.4.2.
- (H) Limitation upon Services for additional conservation responding to Unforeseen

Circumstances to MMCA areas. IA §6.1.6.5.2

(I) DFG agree that Vol. IV(H) contains complete list of mitigations, and otherwise limit mitigations. IA §6.2.3.1, 6.2.3.3, 6.2.4.2.

(J) Director may designate duty to find Unforeseen Circumstance, if designation to non-governmental entity. IA §6.2.4.1

- (K) DFG to have burden of demonstrating that HCP measures not adequate to avoid take. IA §6.2.6.
- (L) Subsequent 2090 opinions to conform to HCP. IA §6.2.7.
- (M) FWS and NMFS not require any new conservation or mitigation. IA §6.3.1(c).

SCE-
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XVI. Comments on HCP/EIS compliance with NEPA/CEQA/CESA/ESA for other species

Substantial evidence proves that Torrent Salamander and Tailed Frog 1) won't be protected by Coho mitigations and 2) will result in appreciable reduction in survival and recovery. (See DFG 11/15/96 notes). Inadequate analysis in EIS/EIR of impact and mitigation.

SCE-
16

Substantial evidence proves that for Pileated Woodpecker, HCP 1) fails to include adequate mitigation and 2) will result in appreciable reduction in survival and recovery. (Gonzales, DFG, 3/17/97). Inadequate analysis in EIS/EIR of impact and mitigation..

Substantial evidence proves that for Pacific Fisher, HCP 1) fails to include adequate mitigation and 2) will result in appreciable reduction in survival and recovery. (FWS, 3/18/97 Review of Biological Info on Pacific Fisher relative to PL SYP Proposal; see also Amedee Brickey, FWS, 5/20/97 memo re mitigation measures for Pacific Fisher in HCP). Inadequate analysis in EIS/EIR of impact and mitigation.

Substantial evidence proves that for Marten, HCP 1) fails to include adequate mitigation and 2) will result in appreciable reduction in survival and recovery. (FWS, 3/18/97 Review of Biological Info on Marten relative to PL SYP Proposal). Inadequate analysis in EIS/EIR of impact and mitigation.

Substantial evidence proves that for American Peregrine Falcon, Bald Eagle, Bank Swallow, Burrowing Owl, California Red Tree Vole, HCP 1) fails to include adequate mitigation and 2) will result in appreciable reduction in survival and recovery. (DFG Mark Stopher 4/14/97 memo to Vicki Campbell, NMFS; see also Gonzalez, DFG 3/24/97 Table on Recommended Mitigations for Bald Eagle; see also DFG 10/17/95 Staff Report on Burrowing Owl Mitigation.) Inadequate analysis in EIS/EIR of impact and mitigation.

Substantial evidence proves that for Western Snowy Plover, HCP 1) fails to include adequate mitigation and 2) will result in appreciable reduction in survival and recovery. (FWS Correspondence with Daniel Burford and Amedee Brickey re Plovers and Gravel Operations; see also FWS 2/23/97 memo to Tuchman; see also DFG Mark Stopher 4/14/97 memo to Vicki Campbell, NMFS.) Inadequate analysis in EIS/EIR of impact and mitigation.

Substantial evidence proves that for Southern Tarrant Salamander, HCP 1) fails to include adequate mitigation and 2) will result in appreciable reduction in survival and recovery. (FWS/DFG, 3/17/97 Properly Functioning Conditions for Southern Tarrant Salamander; see also FWS 2/23/97 memo to Tuchman). Inadequate analysis in EIS/EIR of impact and mitigation.

Substantial evidence proves that for Tailed Frog, HCP 1) fails to include adequate mitigation and 2) will result in appreciable reduction in survival and recovery. (FWS/DFG, 3/17/97 Properly Functioning Conditions for Tailed Frog; see also FWS 2/23/97 memo to Tuchman). Inadequate analysis in EIS/EIR of impact and mitigation.

Substantial evidence proves that for Foothills Yellow Tailed Frog, HCP 1) fails to include adequate mitigation and 2) will result in appreciable reduction in survival and recovery. (FWS/DFG, 3/17/97 Habitat Needs). Inadequate analysis in EIS/EIR of impact and mitigation.

SC E-
16
CON.

Substantial evidence proves that for Western Pond Turtle, HCP 1) fails to include adequate mitigation and 2) will result in appreciable reduction in survival and recovery. (FWS/DFG, 3/17/97 Habitat Needs; see also FWS 2/23/97 memo to Tuchman). Inadequate analysis in EIS/EIR of impact and mitigation.

Substantial evidence proves that for Vaux's Swifts, HCP 1) fails to include adequate mitigation and 2) will result in appreciable reduction in survival and recovery. (FWS 3/20/97 Evaluation of Proposed Mitigation relative to PL SYP proposal). Inadequate analysis in EIS/EIR of impact and mitigation.

XVII. Comments on the Draft Implementation Agreement.

Public review of the project and its impacts was thwarted by the omission of the Exhibits in the draft Implementation Agreement (Draft PL HCP, Vol. VI(D); hereinafter "IA") circulated to the public.

SC E-
17

Recitals and Purposes

p.1

(A) A map of the Plan Area, showing all the Covered Lands, is not attached as Exhibit "A", thus depriving the public of the ability to review. More importantly, a legal description (township, section, range) of the Covered Lands must be provided for this contractual document.

p.2

(B) The term "Headwaters Reserve" not defined. In addition, this Recital does not accurately and completely state the terms of the September '96 Agreement.

SC E -
18

p.3

(H) The IA states that "To obtain an incidental take permit, the applicant must submit a habitat conservation plan describing, among other things, the steps the applicant will take to minimize and mitigate to the maximum extent practicable the impact of such taking." This is an incomplete description of the legal requirements of the requirements for an HCP. This section should include a complete description of the statutory and regulatory requirements.

SC E -
19

p.4

(J) The measures described in the HCP will neither "minimize and mitigate to the maximum extent practicable" nor "fully mitigate" the effects of take incidental to PALCO's Covered Activities.

SC E -
20

(K) FWS and NMFS are violating their duties under section 7 of the ESA and under NEPA by agreeing that "no additional conservation or mitigation will be required of PALCO to minimize and mitigate the impacts of Take of the Covered Species on the Covered Lands."

SC E -
21

p.5

Definitions

"Adaptive Management" How are "these evaluations used over time to adapt both the management directives and techniques" for marbled murrelets, northern spotted owls and all other covered species 1) given the FWS & NMFS commitment not to require from PL any additional conservation or mitigation, 2) given the Services "no surprises" policy, and 3) given the Services "safe harbor" policy?

SCE -
22

The "Additional Lands" are not identified on Exhibit "A." Additional lands should be identified by legal description not by reference to a map. By agreeing that "Additional Lands" "will become Covered Lands to which the Wildlife Agencies will apply the Take authority granted by the Wildlife Agencies" the Services have arbitrarily foreclosed their discretionary authority to deny such actions at the time PL applies for such federal agency action.

SCE -
23

"Assurances Rule" are not attached as Exhibit "I," depriving public of review.

SCE -
24

"Changed Circumstances" as defined at Volume IV, Part H of the HCP specifically provides that the landowner is only expected to implement the HCP Measures and no others, even if additional conservation and mitigation measures are deemed necessary to respond to adverse changes in circumstances. This definition/provision violates the applicant's duty to mitigate to the maximum extent practical, the Services' Section §7(a) obligations, and the duties under NEPA/CEQA to prepare an Supplemental EIS/EIR when there is a change in circumstances that causes a new significant adverse impact

SCE -
25

"Conservation and mitigation" have specific legal definitions which the Services must adhere to rather than unlawfully replacing the Congressional intent of these terms with "commitments" agreed to by the applicant.

SCE -
26

"Covered Activities" are not described in Volume I, Part A of the HCP. Moreover, this IA must include a complete and thorough list of all covered activities so that the public, the agencies and PL understand what is covered by this incidental take permit (ITP) and what is excluded. Omission of a detailed definition prevents the public from understanding the project and its impacts.

SCE -
27

p.7

"Covered Lands" are not depicted on Exhibit "A".

SCE -
28

The list of Covered Species is not included as Exhibit "B". Inclusion of non-listed species must not be within the definition of covered species.

SCE -
29

"Federal Listed Species" should only include those currently listed as threatened or endangered by State and federal governments. The agencies abuse their discretion under NEPA/CEQA and the ESA to include those listed "during the term of the permit" under this definition.

SCE -
30

p.8

MMCA's - Exhibit C not circulated for public review, thus preventing public review and analysis. Moreover, reference to Map25, HCP volume V is inadequate. Only a legal description will suffice to inform the public, the agencies and PL of what lands are included.

SCE -
31

MMCA Conservation Activities are not listed at HCP I(A).

SCE -
32

"Operating Conservation Program" is defined so vaguely as to prevent public review of the project, its impacts and proposed mitigations. HCP Vol. IV, Parts A-E contains numerous terms and statements which could not possibly represent the proposed conservation program. Similarly, HCP Vol. IV(H) includes no measures to deal with changed circumstances.

SCE -
33

p.9

The "Plan Area" is not depicted on Exhibit A. The IA must include a legal description of the Plan Area rather than a vague reference to a map, so that the public and the agencies can comprehend the scope of the project.

SCE -
34

"State Listed Species" should not include Candidates as this violates CEQA and CESA.

SCE -
35

"Unforeseen Circumstances" The definition should not include "and that result in a substantial and adverse change in the status of one or more of the Covered Species."

SCE -
36

p.10

Section 2.1.1. / 2.2.1

- Findings (i-vi) are contradicted by substantial evidence and reached without proper environmental analysis or public disclosure.

SCE -
37

- Further, the Services may not find that the HCP satisfies the Section 10(a)(2)(B) permit issuance criteria for each "Covered Species which is not currently a Federal Listed Species." The Services do not have before them today the evidence regarding Covered Species that will be available at the time the species is listed. To make such a finding will violate the mandate to use the best available scientific evidence and to consider cumulative impacts. Species which today are Other Species of Concern, or State listed species, but not currently Federally Listed Species, cannot be swept under the rug.

SCE -
38

- Also, because the Services make the claim that HCPs are "conservation measures," the Covered Species may forever be denied any future classification as "federally listed". Thus as a practical matter this HCP plan may be the last environmental consideration these Covered Species receive, contrary to the intent of Congress.

SCE -
39

Section 2.1.2 / 2.2.2

- This IA must include a provision that "The Federal Permit will be conditioned on PALCO's specific and timely compliance with each term and condition of the Federal Permit, the HCP, and this Agreement." The San Bruno Mountain HCP included such a provision in its incidental take permit (ITP), which Congress declared a "model."

SCE -
40

- The Services' obligations also include the duty to revoke the permits if PALCO does not specifically comply with each term and condition of the Federal Permit, the HCP, and this Agreement. See ESA §10(a)(2)(C).

SCE -
41

p.12

Section 2.3.1

- Findings (i-xiv) are contradicted by substantial evidence and reached without proper environmental analysis or public disclosure. This is particularly true with respect to finding #ix - that will Avoid Take of Fully Protected Species.

SCE-
42

p. 14

Section 2.3.2

- The State Permit must be conditioned on Palco's full and timely compliance with the terms and conditions of the State Permit, the HCP, and this Agreement.

SCE -
43

- DFG Obligations include the duty to Revoke the 2081 permit if such conditions and terms are not being met.

SCE -
44

p.15

Section 2.4

- CDF obligations must include the commitment by CDF to faithfully implement the terms and conditions of the HCP/SYP and the Permits, and to deny PL's THPs which do not comply with these terms and conditions.

SCE -
45

- Approval of the SYP is contradicted by substantial evidence and reached without proper environmental analysis or public disclosure.

SCE -
46

- Delete "shall cooperate with Palco to implement this Agreement." Replace with "CDF shall cooperate with federal and other state agencies to implement this Agreement."

SCE -
47

Section 3.1

- This section is woefully inadequate as it includes no description of PALCO obligations to fish and wildlife species, other than the marbled murrelet. Pursuant to 16 USC 1539(a)(2)(A)(iv) & 1539(a)(2)(B)(v) this IA must define any and all PALCO obligations, including all those measures deemed necessary by the Services to ensure survival and recovery of the currently listed species.

SCE -
48

Section 3.1.1

- The IA must include a legal description of each grove. Map references are inadequate. Legal descriptions (township, range section) are not "described in detail in Volume IV, Part B of the HCP."

SCE -
49

- The IA is inaccurate in that it must conform to AB1986 by describing both Owl and Grizzly Creek as MMCAs. As circulated to the public, this draft HCP suffers from an indefinite project description.

SCE -
50

p.16

- The IA does not incorporate changes required by AB1986 as is reflected by the IA statement that "The Grizzly Creek MMCA shall be deemed not to be a MMCA until and unless the Grizzly Creek MMCA is substituted for the Owl Creek MMCA pursuant to section 3.1.2 of this Agreement." Thus, the document prevents adequate public review and comment, and at a minimum must be recirculated.

SCE -
51

Section 3.1.1(a)

- The IA must specify the "restrictions and conditions" of the MMCA Conservation Activities. The reference to "restrictions and conditions identified in [HCP] Volume I, Part A and Volume IV, Part B" is inadequate as either missing entirely or so broad as to thwart public review and analysis. SCE-52
- The "MMCA Conservation Activities" listed at IA §3.1.1(a)(ie #1-3, 5-7, & 10) are detrimental to all Covered Species and their habitats. A determination that such activities are beneficial is contradicted by substantial evidence and reached without proper environmental analysis or public disclosure. SCE-53
- The IA must list the existing, active roads that will be used, maintained and stormproofed. Reference to "roads depicted on Volume V, Map 8" is insufficient to provide for public review and analysis. SCE-54
- Removal of trees for road use, maintenance and stormproofing should only be upon prior written concurrence of FWS and NMFS. Removal of trees on such vague terms as specified here leads to an indefinite project description and prevents public analysis of the potential impacts. SCE-55
- Because of significant adverse environmental impacts no mining should be allowed at Allen Creek. The mining is not "particularly described at [HCP] Volume I, Part A," thus depriving the public of review and analysis. SCE-56
- Because of significant environmental impacts no "borrow pits," nor clearance of lands in association with such pits should be allowed. SCE-57
- Scientific surveys are not "particularly described at [HCP] Volume I, Part A." SCE-58

p.17

- Because of significant environmental impacts no fuel removal should be allowed. SCE-59
- Approval of this HCP permit prior to development and approval of the Fire Management Plan prevents review of the entire project and impermissibly defers a potential mitigation.
- Fish releases are not "particularly described at [HCP] Volume I, Part A." SCE-60
- Because of significant environmental impacts no hunting should be allowed. SCE-61

Section 3.1.1(a)

- The section "Except as provided in subsection (b) of this section 3.1.1, no activities other than the MMCA Conservation Activities listed in this section, as conditioned and restricted in Volume I, Part A and Volume IV, Part B of the HCP, shall be allowed within any MMCA unless the Wildlife Agencies determine, **following compliance with all applicable laws** and regulations including NEPA and CEQA, that such activities are compatible with protection of, or are beneficial to, the marbled murrelet and its habitat and the other Covered Species and their Habitats **consistent with the HCP**" is inadequate. The phrase "consistent with the HCP" should be stricken because it elevates consistency with the HCP to conformance with statutory provisions of the ESA, NEPA and CEQA. "Compliance with all applicable laws" should reference the State and federal Endangered Species Acts, including the prohibition on adverse modification of critical habitat. SCE-62

Section 3.1.1(b)

- Any removal of timber from an MMCA should not be allowed. Any application for such activity should be through a permit amendment. The Wildlife Agencies determination of whether to allow such activity is a federal agency action that must also avoid any adverse modification of critical habitat. Moreover, there has been no analysis of impacts of this provision in the draft EIS/EIR or in the draft HCP/SYP. SCE-63

p.18

Section 3.1.1(b)

- Strike the provision "The Wildlife Agencies recognize, however, that the MMCA Conservation Activities identified in subsection (a) are allowed pursuant to this Agreement and the HCP, and therefore will not require any further compliance under NEPA or CEQA on the part of the Wildlife Agencies." This provision violates the statutory sections requiring supplemental EIS/EIRs where significant adverse impacts are disclosed. Further, the EIS fails to analyze this provision.

SCE-
64

Section 3.1.1(c)

- PL is obligated to timely complete each provision of the permit and the IA. Therefore, because they undercut this basic ESA §10 principle the following must be deleted:

- Delete the phrase "to the extent known."

- Delete the sentence "The absence of the description of an MMCA Conservation Activity in an Annual Report shall not preclude PALCO from undertaking such Conservation Activities."

SCE -
65
SCE -
66
SCE -
67

Section 3.1.2

- "Substitution" not defined.

- "Salvage logging" must be prohibited in throughout both Grizzly Creek and Owl Creek groves.

- Inclusion of Grizzly Creek as an area protected permanently for the life of the permit should not require an amendment to the IA.

- The phrases "Covered Activities on the Owl Creek MMCA" and "Covered Lands which are not MMCAs" are so vague and indefinite that it is impossible to know what is being contemplated here for the Owl Creek MMCA.

- By permitting PL to "elect to substitute Grizzly Creek MMCA for Owl Creek prior to the Effective Date" the project description remains unstable and thus avoids proper environmental analysis and public review.

- This section should be removed in light of AB1986.

SCE -
68
SCE -
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SCE -
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SCE -
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SCE -
72
SCE -
73

p. 19

Section 3.1.3

- Each of the "conservation, mitigation and management measures" PL will be required to implement must be spelled out in this IA in order for the public, PL and the agencies to understand PL's enforceable obligations in violation of NEPA, CEQA and §§7 & 10 of the ESA. Reference to "HCP's Operating Conservation Program, including the measures provided for under the Adaptive Management and Changed Circumstances sections of the program" is insufficient because the Operating Conservation Program is broadly defined as HCP Vol. IV (A-E, H). These sections contain numerous provisions which are not intended as mitigation or conservation measures (ie Vol. IV(B)(6) is a discussion of El Nino). Therefore, it is impossible for the public, the decision makers or even PL to know what it is PL is expected to implement. See also comments on definitions of Adaptive Management and Changed Circumstances, supra.

SCE -
74

Section 3.1.3.1

- Failure to define the specific conservation and mitigation prescriptions for aquatic species violates §§7 & 10 of the ESA and constitutes an impermissible post-approval deferral of mitigation measures.
- The IA has not incorporated the provisions of AB1986
- Reference to HCP Vol.I(A) and Vol.IV(D) is inadequate as these sections contain numerous provisions which are not intended as mitigation or conservation measures. Therefore, it is impossible for the public, the decision makers or even PL to know what it is PL is expected to implement.
- The term "properly functioning riparian habitat conditions" is not defined thus preventing public review and analysis

SCE-
75

SCE-
76
SCE-
77

SCE-
78

Section 3.1.3.1(a)

- PL should not be given the discretion to decide on which watersheds to "elect to use the watershed analysis process." Nor should PALCO serve on the watershed analysis teams. That discretion must be retained by the federal agencies and should be decided before the permit is granted or denied.

SCE-
79

p.20

- PL should not be given the ability to disagree with the Wildlife Agencies. To do so elevates the applicant to the position and authority of the government official.
- The IA as written allows a timber prescription to be deemed approved, even if all Wildlife Agencies disagree with PL, unless the Regional Administrator, the Regional Director AND the Director all affirmatively reject the proposed prescription within 45 days of being notified of the disagreement. This provision violates ESA section 7 of the ESA.
- The mitigation measures which PL is expected to implement must be described in sufficient detail in this IA. References to HCP "Volume IV, Part D, Section 1, 3, & 4" are inadequate for the reasons provided above.

SCE-
80

SCE-
81

SCE-
82

Section 3.1.3.1(e)

- There is no description of how the "provisions of the watershed analysis process referred to in this section rely on the State of Washington Department of Natural Resources process" Failure to provide this information in the HCP or EIS/EIR prevents informed decision making and public participation.

SCE-
83

p.21

Section 3.1.4

- The terms "original HCP", "amendments thereto", and "modification" are undefined. State specifically what are you talking about so the public and decision makers can evaluate the project and its impacts.
- It is contrary to ESA sections 7 & 10 to allow "increase in Take beyond that analyzed in the HCP as a permit amendment."

SCE-
84

SCE-
85

Section 3.2

- The term "direct control of PALCO" is undefined. State specifically what are you talking about so the public and decision makers can evaluate the project and its impacts.
- The phrase "...and subject to the conditions of the Federal Permit, the State Permit, the HCP and this Agreement" is meaningless given that the conditions are not specified in this Agreement.

SCE-
86

SCE-
87

- This IA must include a complete and thorough list of all "Covered Activities" so that the public, the agencies and PL understand what is covered by this ITP and what is excluded. Omission of a detailed definition prevents the public from understanding the project and its impacts.

SCE-
88

Section 3.3

- The applicant has not "ensured" that adequate funding will be provided. The phrase "...such funds as may be necessary to fulfill its obligations under the HCP" does not specify the amount or source of such fund, nor what the Service consider "the obligations under the HCP." This omission violates the ESA, NEPA and CEQA.

SCE-
89

- The funding sources that PALCO will use are not "described at Volume I, Part A of the HCP."

SCE-
90

- For a 50 year permit to kill endangered species, the provision which allows PL to defer demonstrating that it has sufficient funds violates ESA §10(a)(2)(B)(iii).

SCE-
91

- The ESA requires a demonstration be made as part of the HCP application that sufficient funds exist to carry out the required mitigation and conservation measures for the life of the permit.

SCE-
92

p.22

- \$1.5 million is an arbitrary number and there is no evidence to support a finding that this amount is adequate funding for the plan. Moreover, adequate funding for the plan should be in the form of a bond which control is vested in the Wildlife Agencies for the life of the permit.

SCE-
93

- "A material change in PALCO's funding resources" is a foreseeable change in circumstances which must be analyzed in the EIS/EIR.

SCE-
94

-Defining "A material change in PALCO's funding resources" as "any change in the financial condition of PALCO which will adversely affect PALCO's ability to manage the Covered Lands" is so broad and vague that it is arbitrary and capricious. Moreover, to the extent that this determination may be made by PL, the agencies have abrogated their ESA duties.

SCE-
95

Section 3.4.1

- The IA must specify (narratively and with defined criteria) each of the monitoring steps PL is to implement. Reference to "PALCO shall implement the monitoring program described at Volume IV, Parts A-F of the HCP" is so vague and overbroad as to make it impossible for the public, the decision makers or even PL to know what it is PL is expected to implement.

SCE-
96

Section 3.4.2 Annual Reports

- To the extent that the IA contemplates requiring survey and data collection for only certain Covered Species it violates the cumulative impact standard and best available scientific evidence standards of NEPA/CEQA and the ESA respectively.

SCE-
97

- The IA fails to define what is meant by the "Operating Conservation Program" in this context. The IA definition for the "Operating Conservation Program" is only a reference to HCP Vol. IV A-E, & H.

SCE-
98

- The IA must specify what surveying "results" PL must submit.

- Limiting Certification "to the best of my knowledge" permits an applicant an escape from any liability for failure to collect the required information. Given PL's history of repeated Forest Practice Act and ESA violations it is an abuse of the agencies discretion to include such a provision.

SCE-
99
SCE-
100

- The HCP/SYP and IA fail to comply with CEQA's requirement for mitigation monitoring and reporting.

SCE-
101

p.23

Section 3.4.2

- Because inclusion of the following violates the ESA, CEQA and NEPA, strike the following terms:

- "best efforts"
- "as least intrusive as possible to PALCO operations"
- "shall not require PALCO to prepare any additional reports"

SCE-
102

- Requiring the Wildlife Agencies to "contact PALCO sufficiently prior to releasing any [claimed Confidential] Information" so as to allow PL to "protect the Confidential Information from release" violates the Freedom of Information Act, the California Public Records Act, and the ESA. There is no such provision in the law. PL has used such a claim in the past to attempt to hide information of species numbers and distribution. Moreover, here "Confidential Information" is circuitously defined as information which PL has designated as Confidential Information.

SCE-
103

p.24

Section 3.4.3

- Wildlife Agencies must be able to inspect not just "any records or documents required to be kept under the HCP" but instead "all records supportive of assertions in the HCP and Annual Reports."

SCE-
104

-Strike "conducted in a manner to be as least intrusive as possible to PALCO operations."

SCE-
105

Section 4.0

- The IA must include the specific portions of the HCP which the Agencies intend to have PL implement. As noted above the IA fails to delineate PL's specific obligations and the lands involved. The draft HCP is a one-sided document authored by the applicant, which contains numerous irrelevant and unsubstantiated statements. Given this, the lazy approach of incorporation by reference of the entire HCP violates the ESA.

SCE-
106

p. 25

Section 5.1

- Extension of the ITP Boundaries should only be considered a permit amendment in order for the Services to comply with the ESA.

SCE-
107

Section 5.2(a)

- Strike "Federal and State Permits will identify all Covered Lands." The IA should identify all "Covered Lands" and the Federal and State Permits will incorporate the IA by reference. All covered lands and additional lands must be identified by a legal description. Reference to Map at Volume V, Map 4 is insufficient for the public to review and analysis the project.

SCE-
108

- The provision which only limits take of northern spotted owl on additional lands during the first 5 years of the Permits infers that take is permitted where lands are acquired as of Year 6, which will not have been analyzed as part of this permit issuance violating the cumulative impact requirements of ESA, CEQA, and NEPA.

SCE-
109

- If northern spotted owls are located a supplemental EIS/EIR and supplemental BO need to be prepared rather than allowing PL to simply add northern spotted owls to the Baseline.

SCE-
110

- The require for additional surveys is a permit condition and should be explicitly stated.

SCE-
111

- The term "Baseline for northern spotted owl" is not adequately defined, thwarting public review and analysis.

SCE-
112

p. 26

Section 5.2(b)

- "Procedure to include Additional Lands as Covered Lands" should meet all ESA section 10 and section 7 provisions. The notice as described is insufficient. This provision prevents a stable project description. Significant adverse and cumulative impacts may result which must also be analyzed pursuant to NEPA and CEQA.

SCE-
113

Section 5.2(c)

- The provision which allows PL to "apply conservation and mitigation measures" to Additional Lands only "until impacts have been fully mitigated," and the provision which implements conservation "unless and until mitigation is complete" both contemplate that mitigation may terminate before the Permit expires. This provision has not been analyzed in the EIS/EIR, nor explained as to why it is mitigation to the maximum extent practicable.

SCE-
114

- The provision which allows PL to terminate its HCP obligations upon relinquishment of the permit has not been analyzed in the EIS/EIR, nor explained as to why it is mitigation to the maximum extent practicable.

SCE-
115

p. 27

Section 5.2(c)

-PALCO need not own Additional lands, only have proof of right to engage in applicable "Covered Activities" relevant to the parcel in order to have the additional lands fall within the within scope of the ITP. This provision makes the project description unstable and has never been analyzed in the EIS/EIR.

SCE-
116

Section 5.3.1(a)

- Transfer of ownership or control of Covered Lands, outside MMCAs must include approval by the Services as an amendment to the Permits, and not as "Minor Amendments". As such these transfers are subject to Section 7 consultation, as well as NEPA and CEQA compliance.

SCE-
117

p.28

Section 5.3.1(c)

- Determinations of whether PL is required to provide additional mitigations should be made after PL has applied for such an amendment and the Services have complied with ESA §7, NEPA, and CEQA.

SCE-
118

Section 5.3.2

- "Disposal" of Covered Lands must include approval by the Services as Permit Amendment, and not simply by PL filing a notice and a map. These transfers are subject to Section 7 consultation, as well as NEPA, and CEQA compliance.

SCE-
119

- Under 5.3.2(a), the fifth condition reads "the addition of the acquired tract as Covered Lands will not result in impacts not analyzed and mitigated under the HCP, or any amendments thereto, and will not result in unauthorized Take under the Federal and State Permits". This demonstrates the need for a supplemental EIS/EIR at the time of such disposal.

SCE-
120

p. 29

Section 5.3.2(a)(i)

- Use of the terms "legal control" and "proof of the right to engage in the applicable Covered Activities" indicate that this Permit is intended to apply to Additional Lands where PL obtains the right to cut timber, or engage in any other "Covered Activity." This provision makes for an indefinite project description, particularly where no legal description has been provided of the additional lands. The environmental impacts of these provisions have not been analyzed under the EIS/EIR.

SCE-
121

Section 5.3.2(b)

- There is no statutory authority to allow 500 acres to be removed from the project without compliance with ESA/NEPA/CEQA and all other applicable laws.

SCE-
122

p30

Section 5.5

- Exhibit "D" not included, thus depriving the public of the ability to analyze the project and its impacts. Any disposal of MMCAs or portions thereof must be processed as a Permit Amendment. These transfers are subject to Section 7 consultation, as well as NEPA, and CEQA compliance.

SCE -
123

p.31

- Reference to conditions or mitigation measures on the remaining Covered Lands specified at HCP, Volume I, Part A frustrates public review and analysis because Part A does not describe any such conditions or mitigation measures.

SCE -
124

Section 6.1.1

- Application of this permit to Covered Species which are not currently listed as a Federal Listed Species is an abuse of agency discretion as it violates ESA §7 duties, prevents a cumulative impact analysis under NEPA/CEQA, and thwarts any future supplemental EIS/EIR.

SCE -
125

page 32

Section 6.1.3.

Limiting the Services ability as a result of future §7 consultations to "impose any **new, additional or different** conservation or mitigation measures on PALCO beyond the requirements provided for under the HCP and this Agreement" violates the Services' Section 7 duties and prevents analysis of cumulative impacts.

SCE -
126

Section 6.1.4

- This provision violates the ESA and is null and void: Congress has not granted the USFWS nor NMFS the authority to lift critical habitat designation for the marbled murrelet for so long as the Federal Permit remains in effect.

SCE -
127

- HCPs such as this are not conservation measures that eliminate the need for critical habitat designation. Therefore, the Services can not consider this HCP as a conservation measure in their preparation of any proposed determination of critical habitat for any other Covered Species under their respective jurisdictions or revision of critical habitat for the MURRELET.

SCE -
128

- Congress prohibits federal agencies from adversely modifying critical habitat. Thus, upon critical habitat being designated for any Covered Species, additional mitigations may be required to avoid adverse modification of such critical habitat, despite PALCO's implementation of the terms of the HCP.

SCE -
129

page 33

Section 6.1.5.(b)(2)

- This subsection turns the ESA duty to "minimize and mitigate adverse impacts to the maximum extent practicable" on its head. This subsection provides minimization of economic impacts to PL, not minimization of environmental impacts to species. Therefore, this provision is null and void.

SCE-
130

Section 6.1.6.1

- The application of the "No Surprises" Rule to the Permit, IA and the HCP violates ESA §7 and the cumulative impacts analysis required under the ESA, NEPA and CEQA. Federal Agencies have a Section 7(a)(1) duty to avoid jeopardy of species. Thus, additional information of significant adverse impacts is a valid ground for a permit modification.

SCE-
131

p.34

Section 6.1.6.3.

- The murrelet's continued decline is a foreseeable circumstance. In addition, the Services may not allow PL to elect which regulations to comply with. To do so is arbitrary and an abrogation of federal duties.

SCE-
132

Section 6.1.6.4.1

- All potential Changed Circumstances need to be analyzed as part of Cumulative Impacts.
- HCP Vol. IV(H) contains an incomplete list of Changed Circumstances.

SCE-
133
SCE-
134

Section 6.1.6.4.2

- Volume IV, Part H of the HCP does not contain any such conservation and mitigation measures referenced in this subsection. Thus the IA needs to state explicitly what the conservation and mitigation measures will be.

SCE-
135

page 36

Section 6.1.6.5.2

- The provision which limits additional conservation and mitigation measures violates ESA §7, required cumulative impacts analysis, as well as thwarts the CEQA/NEPA provisions for supplemental environmental review, particularly where this provision arbitrarily limits the additional conservation and mitigation measures to the current MMCAs, which are the only "Conserved Habitat Areas."

SCE-
136

page 37

Section 6.1.6.6.

- The provision stating that "The Services ..have significant resources and authorities that can be utilized to provide additional protection to Covered Species" is unsubstantiated and needs to be analyzed in the DEIS/DEIR.

SCE-
137

Section 6.2.2.(a)

- To the extent this Section in the IA contractually takes away the State's discretion to deny an incidental take permit, the IA is void.

SCE-
138

- page 30
missing from
original.

page 47

Section 7.1.2(4)

- The additions and disposals of Covered Lands are not Minor Modifications, but should be processed as Permit Amendments.

SCE-
139

Section 7.2.

- The General Federal Permit Amendment Process outlined in the IA is inadequate because it does not meet the so-called Congressional model HCP (San Bruno Mountain HCP) in so much as those minimum requirements are not met.

SCE-
140

page 48

Section 7.2.3.

- The IA provision allowing Amendment of the Permit to Allow Covered Activities Within MMCAs should be analyzed as reasonably foreseeable change.

SCE-
141

Section 8.1

- The stated duration of the IA/HCP to remain in effect for 50 years is unsubstantiated.

SCE-
142

page 49

Section 8.2

- This subsection contains vague language regarding a "non-agreement between PALCO and the Agencies." This lack of definition causes the project description to be unstable.

SCE-
143

- Any discussion of any suspension of PALCO's permit should include a complete prohibition against logging for the duration of the suspension.

SCE-
144

- The limitations placed on USFWS and NMFS by the terms of the IA ignore their statutory duty to revoke the Federal Permit if permit conditions are not met under 1539(a)(2)(C).

SCE-
145

- The wording in this subsection regarding revocation or suspension of the Federal Permit only after an adjudicatory process is contrary to the ESA.

SCE-
146

- The wording discussing assurances made in section 6.1.6 of this Agreement conflicts with section 6.1.6 as 6.1.6. says no additional mitigation is required.

SCE-
147

- Another misstatement is where the IA states "PALCO shall remain obligated to mitigate for the impacts of all Take that occurred under the Federal Permit prior to its revocation in accordance with section Volume I, Part A of the HCP", yet there is no mitigation included at that section.

SCE-
148

page 50

Section 8.3

- Any suspension or revocation under this subsection that "may apply to the entire State Permit and Streambed Alteration Agreement..." must apply to the whole permit.

SCE-
149

- The HCP does not override final Regulations.

SCE-
150

Section 8.3.1.

- Written notice under this subsection shall not required by CDFG.

SCE-
151

- During the period of suspension PALCO must be prohibited from any logging or logging related operations.

SCE-
152

page 51

Section 8.3.1.1

- The word "reasonable" should be stricken from this subsection.

SCE-
153

Section 8.3.2

- The reference here to Section 6.3(a) is unclear as there is no such section.
- The State Permit or Streambed Alteration Agreement should be revoked for any violation.
- "Effectiveness" is vague and undefined.

SCE-
154

page 53

Section 8.5.2

- The mitigation discussed should also take into consideration in its analysis the habitat conditions of residual old growth stands destroyed outside the MMCAs.

SCE-
155

p. 56

Section 9.1(4)

- Inclusion of language to which agencies don't agree make for an unstable project description.

SCE-
156

page 57-58

Section 9.2.1(c)

- This section should be amended to read "The requirement that the Agencies meet and confer with PALCO prior to taking an action described in Section 9.2.1(a) shall not apply to disputes arising...where the applicable Agency determines that the action must be taken immediately to avoid violation of applicable law, including jeopardy..., or adverse modification of Critical Habitat.

SCE-
157

XI. Conclusion.

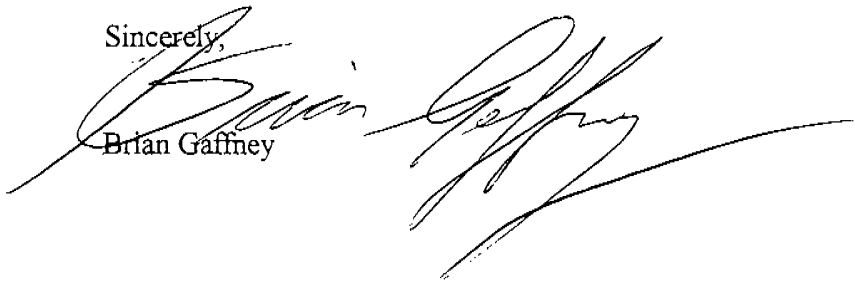
Please circulate the final EIS/EIR, as well as final HCP and Implementation Agreement to any commenter who submitted substantive comments. In addition, any deficiencies in these draft documents cannot be rectified in the Response to Comments. Neither PL nor the government agencies can submit obviously deficient documents, as here, and wait for the public to cure their errors. Also, any major changes should result in recirculation of the entire documents so that the public has the opportunity to analysis changes in their context.

For all of the reasons set forth above, the Sierra Club and EPIC request that the agencies not certify the EIS/EIR as complying with NEPA or CEQA and that PL's application for the federal and state permits be denied.

Thank you for your attention to these comments.

Sincerely,

Brian Gaffney



Bibliography of Evidence Submitted Herewith

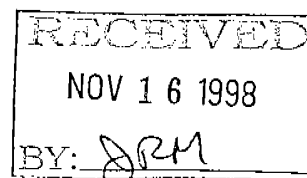
1. Harry R. Carter 11/11/98 comments
2. S. Kim Nelson 11/12/98 letter to USFWS and CDF
3. USFWS Recovery Plan for the Marbled Murrelet
4. USDA Ecology and Conservation of the Marbled Murrelet
5. Status -- Carter and Morrison
6. Final Rule -- Marbled Murrelet Listing
7. Final Rule -- Marbled Murrelet Critical Habitat Designation
8. Northwestern Naturalist (Spring 1995)
9. Stanley 10/12/98
10. Marzluff
11. Birds of North American no 276 (1997)
12. Abstract p. 40 Re: 1997 Kure Oil Spill
13. Viability Assessment
14. Pacific Seabird 15/7/96
15. Pacific Seabird Group (March 1994)
16. Pacific Seabird Group Technical Paper #1 (March 1993)
17. 4/14/94 Letter from Fish and Wildlife Service (Gary Miller et al) to Marvin Plenart
18. Western Forest HCP Inventory
19. Synopsis of Biological Opinions
20. Guidelines for Interpreting HCP database
21. Biological opinions (Non-HCP)
22. Biological Opinion for Washington Department of Natural Resources HCP
23. Biological Opinion for Elliott State Forest HCP

24. Biological Opinion for Simpson Timber Company HCP
25. Biological Opinion for Weyerhaeuser-Millicoma Tree Farm HCP
26. Biological Opinion for Murray-Pacific - Mineral Tree Farm HCP, and Amendment
27. Biological Opinion for Regli Estate HCP
28. Biological Assessment/Evaluation for Arcata BLM District
29. Other Species Information
30. NMFS Analysis draft 5/22/98
31. ^{12/31/96}~~1/31/96~~ Letter from Brian Gaffney to Bruce Babbitt et al, regarding Pacific Lumber Company Application for Incidental Take Permit
32. 1/24/97 Letter from Brian Gaffney to Bruce Babbitt et al regarding U.S. Department of Agriculture's Acceptance of Payment from Pacific Lumber Company and Failure to Timely Respond to FOIA Requests
33. 6/25/97 Letter from Brian Gaffney to Bruce Babbitt et al regarding Agency Discretion in Processing Pacific Lumber Company's Habitat Conservation Plan
34. 8/8/97 Letter from Brian Gaffney to Phil Detrich et al regarding Pacific Lumber's Claim of Economic Impracticability
35. 8/24/98 Letter from Brian Gaffney to Bruce Halstead regarding Agency Actions Prevent Adequate Public Comment. Permit Applications #PRT-82950 and 1157 PALCO Draft SYP/HCP
36. 11/12/98 Letter from Brian Gaffney to Mark Stopher regarding Submission of Comments on Pacific Lumber Co.'s HCP/SYP
37. Documents Received from U.S. Fish and Wildlife Service and National Marine Fisheries Service as a result of Freedom of Information Act requests.

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August 24, 1998

Mr. Bruce Halstead
U.S. Fish and Wildlife Service
1125 16th Street, Room 209
Arcata, CA 95521-5582

RE: Agency Actions Prevent Adequate Public Comment
Permit Applications #PRT-82950 and 1157 PALCO Draft SYP/HCP

Dear Mr. Halstead,

This office represents the Sierra Club and the Environmental Protection Information Center ("EPIC") with respect to Pacific Lumber Company's HCP/SYP ("HCP"). It has come to my attention that the current date for close of public comment on the HCP is October 13, 1998, but that the draft EIS/EIR will not be issued until some time in early October. Needless to say, this schedule makes no sense. The purpose of the EIS/EIR is to provide the public and other interested agencies with detailed information on the environmental impacts of the proposed HCP, particularly on listed species and their habitat, and with the opportunity to comment on the proposal to bring pertinent information to the attention of the government decision makers before they make a decision.

The draft HCP contains PALCO's view of these issues. The draft EIS/EIR is supposed to contain a more objective analysis of the environmental impacts of the HCP/SYP. (See e.g. Friends of La Vina.) Without the information provided by the EIS/EIR, the public cannot effectively participate in the review and comment on the HCP/SYP.

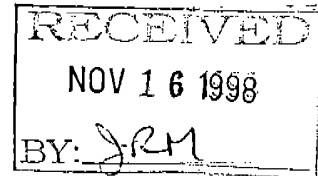
An adequate response by the public to the PALCO draft SYP/HCP is being prevented by numerous actions on behalf of the U.S. Fish & Wildlife Service (FWS), National Marine Fisheries Service (NMFS), and the U.S. Forest Service (USFS). The actions of the federal agencies have resulted in the public, including the Sierra Club and EPIC, being deprived of information essential to analyzing and commenting on the draft SYP/HCP. The information which the federal agencies are withholding include, *inter alia*, 1) Map 7 (stream type protection zones) of Volume V of the draft SYP/HCP is incomplete; 2) the CERES website is incomplete in that numerous sections of the HCP are still not posted on the site; 3) the promised CD ROM is still not available; 4) there have been numerous, chronic delays in response to Freedom of Information Act (FOIA) requests filed by the public; and 5) numerous documents referred to in the draft SYP/HCP are neither included within the HCP nor otherwise available to the public.

In particular, the federal agencies have been extremely dilatory in responding to FOIA requests. NMFS has failed to provide any response to FOIAs filed March 26, 1998, May 29, 1998, July 24, 1998 and August 4, 1998, despite the fact that the proper administrative appeals have been filed. Only recently (7/28/98) has NMFS responded to a FOIA request filed almost a year ago on August 1, 1997, and that response according to the agency itself has been incomplete. Similarly, the FWS has failed to make any

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August 8, 1997

Mr. Phil Detrich
U.S. Fish and Wildlife Service
Forest HCP Team Leader for California
3310 El Camino Avenue, Suite 120
Sacramento, CA 95821

Mr. Paul Henson
U.S. Fish & Wildlife Service
2600 S.E. 98th Avenue, Suite 100
Portland, OR 97266

Mr. William Hogarth
National Marine Fisheries Service
501 West Ocean Blvd., Suite 4200
Long Beach, CA 90802

Re: Pacific Lumber's Claim of Economic Impracticability

Dear Mssrs. Detrich, Henson and Hogarth,

I am writing on behalf of the Sierra Club and the Environmental Protection Information Center regarding your agencies' ability to require Pacific Lumber Company demonstrate that their proposed HCP minimizes and mitigates impacts to listed species to the maximum extent practicable.

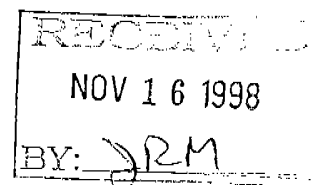
The U.S. Fish & Wildlife Service and the National Marine Fisheries Services (Services) have the discretion to specify any measures that are appropriate or necessary for purposes of a Habitat Conservation Plan. 16 USC 1539(a)(2)(A)(iv); 50 CFR 17.22(b)(1)(iii)(D). In particular, to issue an incidental take permit (permit) the Services must be able to find that a permit applicant will, to the maximum extent practicable, minimize and mitigate the impacts of taking. 16 USC §1539(a)(2)(B); 50 CFR 17.22(b)(2)(ii).

Therefore, in order to obtain an incidental take permit, PL has an obligation to provide the information necessary for the Fish & Wildlife Service to evaluate the permit application. 50 CFR 17.22; 50 CFR 13.5. Specifically, U.S. Fish & Wildlife regulations require supporting documentation be provided by the permit applicant. 50 CFR 13.12(a)(3), (b).

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VIA FACSIMILE AND U.S. MAIL.

November 12, 1998

Mr. Mark Stopher
Calif. Dept of Fish and Game
601 Locust
Redding, CA 96001

Dear Mark,

This office represents EPIC and the Sierra Club in respect to the proposed Pacific Lumber Co. HCP/SYP. EPIC and Sierra Club will be submitting comments on 1) PL's request that Calif. Dept of Fish and Game (DFG) consider the HCP/SYP to be a NCCP (F&G 2835), 2) PL's request that DFG enter into a Streambed Alteration Agreement (F&G 1603), and 3) factors for DFG to consider in their 2090 consultation.

Today you confirmed that it was sufficient for EPIC/Sierra Club to submit comments and supporting evidence on the above issues to John Munn (Calif. Dept of Forestry) at the address noted in the State's Official Notice, and that such comments did not also need to be sent to DFG.

Thank you for the clarification.

Sincerely,

A handwritten signature in cursive script, appearing to read "Brian Gaffney".

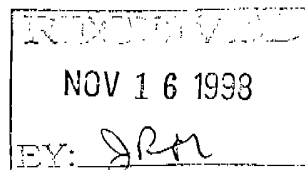
Brian Gaffney

cc: Tara Mueller, Esq.
Tom Lippe, Esq.

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January 24, 1997

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Mr. Tom Tuchmann
Office of the Secretary
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Mr. Dan Glickman
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Mr. Michael Spear
U.S. Fish & Wildlife Service
911 N.E. 11th Avenue
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Ms. Hilda Diaz-Soltero
National Marine Fisheries Service
501 West Ocean Blvd, Ste. 4200
Long Beach, CA 90802

Ms. Katie McGinty
Council on Env. Quality
Room 360
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Washington D.C. 20502

**RE: U.S. Dept. of Agriculture's Acceptance of Payment from Pacific
Lumber Company and Failure to Timely Respond to FOIA Requests**

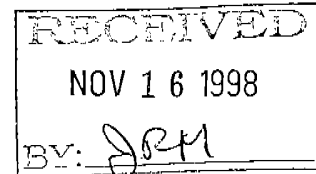
Dear Sirs and Madams:

It has come to the attention of the Environmental Protection Information Center (EPIC) and the Sierra Club that the federal government through the U.S. Dept of Agriculture's Redwood Sciences Lab (Agriculture) is prepared to accept over \$200,000.00 from the Pacific Lumber Company (PALCO). This money will be paid so that Agriculture will prepare a report supporting PALCO's application for a permit to kill endangered species under Section 10(a) of the Endangered Species Act. 16 U.S.C. §1539(a). Simultaneously, Agriculture's Redwood Science Lab as well as the National Marine Fisheries Services have failed to meet their obligations to provide the public with requested information within the timelines provided by the Freedom of Information Act (FOIA). 5 U.S.C. § 552 (a)(6)(A)(i).

Given that the U.S. Dept. of Agriculture is a member, along with the U.S. Fish & Wildlife Service, of the Executive Committee created to implement the Headwaters Agreement, the U.S. Department of Agriculture's acceptance of money from PALCO will only increase the existing

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June 25, 1997

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Mr. William Hogarth
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Long Beach, CA 90802

RE: Agency Discretion in Processing Pacific Lumber Company's Habitat Conservation Plan

On December 31, 1996 EPIC and the Sierra Club sent you a letter detailing the legal standards and biological limitations which must guide the USFWS and NMFS (collectively "the Services") in reviewing Pacific Lumber Company's (PALCO's) Incidental Take Permit (ITP) application. As previously stated, the law mandates that recovery of covered species be the guiding principle for the federal agencies in reviewing PALCO's ITP application and that the Services must consider the direct, indirect and cumulative effects of ITP issuance on each species covered by the Incidental Take Permit.

We understand that PALCO may be attempting to persuade the federal agencies that previously issued Incidental Take Permits set precedents which limit the agencies' discretion in reviewing the current PALCO ITP application. This assertion is clearly incorrect. Neither the ESA, NEPA, their implementing regulations, nor the Services' HCP Handbook¹ in any way require the Services to follow previously issued ITPs in reviewing PALCO's current ITP application.

¹ Endangered Species Habitat Conservation Planning Handbook, USFWS and NMFS, Nov. 1996.

In fact, our review of other forestland ITPs in the Pacific Northwest reveals that previous ITPs violate the National Environmental Policy Act (NEPA) and Sections 7 and 10 of the Endangered Species Act (ESA). 42 U.S.C. § 4331 et seq.; 16 U.S.C. §§ 1536, 1539. Specifically, these previous ITPs fail to analyze direct, indirect and cumulative impacts to listed species, conflict with the agencies' own Habitat Conservation Plan (HCP) guidelines and, most importantly, fail to insure species survival and recovery. Therefore, it is our opinion that the Services are legally required to adopt a substantially different approach in regards to PALCO's HCP from that followed by the Services in the past. This position is only strengthened by our knowledge of the continued precipitous decline of the marbled murrelet in northern California. We hope that by detailing the inadequacies of previously issued ITPs the Services will take heed and avoid similar abuses in current and future review of Incidental Take Permits.

I. HCPs ISSUED BY THE U.S. FISH & WILDLIFE SERVICE TO DATE WILL SIGNIFICANTLY IMPAIR THE PROSPECTS OF SPECIES RECOVERY.

The ESA's primary goal is to recover endangered and threatened species, a goal which the ESA seeks to achieve above all others. As the U.S. Supreme Court stated in T.V.A. v. Hill, 437 U.S. 153, 184 (1978) (recently reaffirmed by Babbitt v. Sweet Home Chapter of Communities, 115 S. Ct. 2407 (1995)): "the plain intent of Congress was to halt and reverse the trend toward species extinction, whatever the cost." Because this recovery goal is the cornerstone of the ESA, all ESA implementation actions must be construed in light of it. Specifically, the ESA requires the Services to insure that the taking permitted by an HCP does not reduce the likelihood of a species recovery in the wild. 16 U.S.C. § 1539(a)(2)(B)(iv); HCP Handbook, p. 3-20; Idaho Dep't of Fish and Game v. Nat'l Marine Fisheries Service, 850 F.Supp. 836, 899 (D. Or. 1994) (rejecting the argument that federal agency action which results in improved chances of species survival could never constitute jeopardy).

Yet this plain intent of Congress to reverse species extinction has been thwarted by the U.S. Fish & Wildlife Service's issuance of ill-conceived forestland Incidental Take Permits. Specifically, few, if any, current forestland HCPs even attempt to recover listed species. This despite the agencies' mandate to recover listed species and not preclude recovery of candidate species. In some instances the ESA's mandatory recovery goal has been replaced by a completely different test of "net benefit for species," which is measured by a comparison to a no action alternative that assumes unrestricted

cutting of habitat is permitted. Elsewhere, mere compliance with state forest practice act rules, which fail to meet the conservation mandates of the ESA, is deemed sufficient mitigation. Further, numerous HCPs have even permitted cutting of owl nesting habitat once the breeding season is over or the landowner determines that a nest site has been abandoned.

In addition, because the Services frequently fails to timely design recovery plans as required by Section 4(f) of the ESA, the Services' own guideline recommending that HCPs facilitate implementation of recovery plans is rendered ineffective. See HCP Handbook p. 3-20.

Thus, the USFWS's lax oversight of Habitat Conservation Plans and associated ITPs on Pacific Northwest forestlands have set a poor standard for species recovery; one which the Services are certainly not required to follow in issuing an ITP to PALCO.

II. HCPs FREQUENTLY FAIL TO ADEQUATELY ANALYZE THE DIRECT, INDIRECT AND CUMULATIVE EFFECTS OF INCIDENTAL TAKE PERMITS.

An enormous amount of private forestland in the Pacific Northwest is already subject to Incidental Take Permits for listed species. Approved HCPs cover approximately 2,570,000 acres of forests in California, Oregon and Washington. Another 400,000 acre HCP is pending for Weyerhaeuser's lands in the Willamette Valley in Oregon.² It is estimated that these previously issued and pending HCPs will result in take of at least 528 pairs of northern spotted owl through the cutting of currently utilized nesting, roosting and feeding habitat.

Pursuant to NEPA, in issuing an ITP, the Services are required to analyze "cumulative actions, which when viewed together have cumulatively significant impacts." 40 C.F.R. § 1508.25(a)(2). "Cumulative impact" is defined as the impact on the environment that results from "the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions." 40 C.F.R. § 1508.7; Inland Empire Public Lands Council v. Schultz, 992 F.2d 977, 981 (9th Cir. 1993). Analysis of cumulative

² Special thanks are owed to Daniel Hall for his overview of common HCP problems in Using Habitat Conservation Plans to Implement the Endangered Species Act in Pacific Coast Forests, Revised Draft (April 10, 1997), pg. 4-5.

purported benefit of the HCP to the species covered.³ Not only does such an assumption violate NEPA but also is contrary to the Services' ESA obligations, including their duties to insure recovery and to minimize impacts to species.

Therefore we expect the Services will thoroughly analyze the cumulative impacts to all species covered by PALCO's ITP and thereby avoid the deficiencies exhibited in other forestland HCPs.

III. PREVIOUSLY ISSUED ITPs HAVE FAILED TO MINIMIZE AND MITIGATE IMPACTS TO THE MAXIMUM EXTENT PRACTICABLE.

Section 10a of the ESA requires an HCP to "to the maximum extent practicable, minimize and mitigate impacts of such taking." 16 USC 1539(a)(2)(B)(ii). This provision sets two separate standards. One, that the HCP must minimize impacts to the maximum extent practicable and second, that any impacts must be mitigated to the maximum extent practicable.

A. Minimization of Impacts

There are a number of deplorable examples where HCPs have undoubtedly failed to minimize impacts. The Murray Pacific HCP, rather than minimizing impacts, allows harvest of timber within the home range of 3 - 4 northern spotted owls on the property, even though this home range habitat accounts for only 8.6% of the entire ownership. Similarly, the Coast Range HCP permits harvest of the 4% of the ownership which is still old-growth forest on the grounds that the remainder of their forestland was so young that it was "not yet suitable for harvest."

HCPs have also have failed to minimize take where occupied nest sites are allowed to be cut during the off-nesting season and where cutting of trees is allowed once sites are purportedly "abandoned." In addition, many HCPs fail to require the landowner to manage the forest for specific stand conditions. The proposed Weyerhaeuser Willamette HCP goes so far as to require maintenance of only 10% of

³ Undoubtedly, proper and effective enforcement by the Services of the ESA's Section 9 take prohibition would aid landowners in determining exactly what "no action" entails. In fact, HCPs for the Washington DNR, Murray Pacific, Weyerhaeuser Willamette and Weyerhaeuser Millacoma have all explicitly stated that viable northern spotted owl habitats and populations are currently not being adequately maintained with the Service's present policy of inadequate Section 9 enforcement.

C. Maximum Practicability of Mitigations and Minimizations

A number of problems exist regarding how the USFWS has addressed the practicability of impact minimizations and mitigation measures. Although the USFWS's HCP Handbook requires landowners to provide data supporting claims of impracticability of mitigations, the USFWS frequently has failed to require such documentation or even analyzed the claimed economical practicability. See HCP Handbook, p. 7-3. For example, the Coast Range HCP rejects all silvicultural methods other than clearcutting as impractical. Similarly, the Weyerhaeuser Millacoma HCP rejects alternatives on the grounds that it would require management, rather than cutting, of more mature forests.

In particular, the proposed Weyerhaeuser Willamette HCP entirely conflicts with the legal standard by allowing Weyerhaeuser to reduce or avoid mitigation commitments if the company determines at some future time that the mitigation measures have become economically unpracticable. Currently, there are no stated limitations on the types of situations this provision covers. Conversely, however, the company is not required to improve mitigation measures if this becomes more practicable over time.

Clearly, if the marbled murrelet, the northern spotted owl, the coho salmon and other species are going to survive and recover, when assessing PALCO's ITP the Services must not repeat the mistakes of the past regarding minimization and mitigation of impacts.

IV. HCPs FREQUENTLY CONTAIN INADEQUATE ENFORCEMENT AND IMPLEMENTATION PROVISIONS.

By approving ITPs which include inadequate enforcement, monitoring and implementation measures, the Services have further failed to meet their overriding duties to conserve species and to minimize and mitigate impacts.

Unfortunately, many Implementation Agreements (IAs) for forestland HCPs have not included provisions which would allow the Services to monitor and rigorously enforce HCP conditions; instead, landowners have been placed in charge of monitoring their own performance with no oversight from the Services or disinterested third parties. Detailed and accurate monitoring is essential for adequate permit implementation and enforcement. Without it, the Services are unable to determine whether HCP conservation strategies (mitigations) are actually promoting species survival and recovery. Simple stocking

IV. "NO SURPRISES" POLICY PRECLUDES THE SERVICES FROM ENSURING THE SURVIVAL AND RECOVERY OF CURRENTLY AND SUBSEQUENTLY LISTED SPECIES

As we have repeatedly asserted the Services' "no surprises" policy precludes the Services from ensuring the survival and recovery of currently and subsequently listed species in direct violation of the ESA. The no surprises policy limits both the circumstances under which the federal government may require additional mitigation measures, as well as the type of mitigation that may be required. Under this policy, if new information or changed circumstances reveal that the terms and conditions of the HCP are inadequate to ensure the continued survival and recovery of the species covered by the plan, the federal government may nevertheless be unable to require additional mitigation sufficient to protect these species, unless it pays for such mitigation itself. However, the government has not guaranteed that adequate funding will be available to do so. Thus, the policy forecloses the Services from using "all methods and procedures necessary" to conserve species and from insuring that its actions will not jeopardize listed species or adversely affect critical habitat, in violation of its section 7 duties. Further, the policy prevents the federal government from ensuring that an HCP fully mitigates all impacts to and does not jeopardize the continued existence of listed species under section 10.

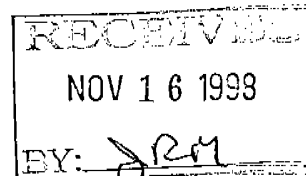
In addition, if any unlisted species are to be "covered" by (i.e. included within the scope of) an HCP, these species must be treated as if they are listed. House Conf. Rpt. No. 97-835, 97th Cong, 2d Sess., p. 30; HCP Handbook, p. 4-4. In other words, the HCP must meet section 10(a) standards for each covered species. There also must be a justifiable scientific basis for species coverage determinations. The USFWS' policy of providing coverage to named and unnamed species that occupy the same habitat as listed species, without any scientific justification or even analysis, is impermissible and inconsistent with the ESA.

The HCP Handbook notes that including unlisted species in an HCP raises the question of how to address a species' conservation needs when the species has not been well studied. Yet, in most forestland HCPs neither the landowner or the Services have surveyed for unlisted plant and animal species. Specific surveys are needed to establish a credible baseline for no surprises agreements. Consulting a state natural heritage database is inadequate. The HCP Handbook states that even low effect HCPs should be based on surveys.

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December 31, 1996

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Ms. Hilda Diaz-Soltero
National Marine Fisheries Service
501 West Ocean Blvd, Ste. 4200
Long Beach, CA 90802

RE: Pacific Lumber Company Application for Incidental Take Permit
Pursuant to Section 10(a) of the Federal Endangered Species Act

Dear Sirs and Madams:

We write on behalf of the Sierra Club and the Environmental Protection Information Center (EPIC) regarding the Pacific Lumber Company's (PALCO's) proposed application for incidental take of marbled murrelets, northern spotted owls, and coho salmon pursuant to section 10(a) of the federal Endangered Species Act (ESA). The Sierra Club and EPIC have dedicated over a decade to the preservation of the old growth redwood forest ecosystem on PALCO lands in Humboldt County, California (collectively known as "Headwaters forest") through a variety of means, including monitoring, administrative action, litigation and negotiation. The September 1996 Agreement between Maxxam, the United States and the State of California (hereafter "Headwaters forest agreement"), and PALCO's application for an incidental take permit (ITP) and associated habitat conservation plan (HCP) is perhaps the final chapter in this ongoing, often Herculean effort to save the largest remaining stands of old growth redwoods on private lands.

Under the Headwaters forest agreement, the federal and state governments have agreed to pay PALCO's parent corporation, Maxxam, \$380 million in cash and/or government assets to acquire two of the six critical remaining old growth groves in Headwaters forest. In

addition, the agreement states that "the parties agree to use their respective best, good faith efforts" to process an ITP covering all of PALCO's landholdings (including property acquired and exchanged by the government) within ten months following execution of the agreement. If the ITP is not processed and approved by the wildlife agencies within this time frame, Maxxam retains the right to terminate the agreement.

The PALCO ITP and HCP not only will determine whether endangered species will be extirpated from PALCO lands, but will also set a precedent that will likely govern take of murrelets, owls and coho throughout the Northwest forest ecosystem. There are at least eight more HCPs proposed for Northern California alone that are awaiting the outcome of the PALCO HCP process, and many more in Oregon and Washington in various stages of development, that cover millions of acres of forest across these species' entire range. These HCP applicants will expect treatment that is at least as good, and perhaps better, than that given to PALCO. However, many of the old-growth dependent species are so imperiled that any level of take is highly likely to directly and cumulatively jeopardize their ability to survive.

For these reasons, we are extremely concerned with the outcome of the PALCO HCP process. If PALCO's HCP is based on a convenient political solution rather than the best available scientific evidence, this will almost certainly spell the beginning of the end for the old growth redwood ecosystem and the species that inhabit it. Unfortunately, given the political dynamics of the Headwaters forest agreement and the track record of HCPs to date, we fear that the PALCO HCP could result in direct and cumulative adverse impacts to old-growth dependent species and their habitats. We are also concerned that this HCP will seriously undermine these species' prospects of survival and recovery, contrary to the express purpose of the ESA.

Although to date we have not been allowed to be directly involved in the HCP process, we herein set forth our opinion of the legal and biological standards that PALCO and the federal agencies must meet.

I. EXECUTIVE SUMMARY

In summary, our comments are that:

- * A minimum ninety day period should be provided for public comment on the HCP and accompanying NEPA documentation
- * PALCO should be required to hold meetings and workshops with the public in order to jointly develop the draft HCP
- * Recovery of covered species must be the guiding principle for the USFWS and the NMFS in reviewing the incidental take permit application and proposed habitat conservation plan
- * Citizen enforcement of the ESA has prohibited PALCO from destroying or modifying redwood forest stands which serve as occupied habitat for the marbled murrelet

- * Compliance with the ESA will require mitigation for any adverse impacts caused by take of endangered species entirely separate from the Headwaters and Elkhead Springs groves which are being purchased by the state and federal governments
- * USFWS and NMFS must rely on the best available scientific data in carrying out their duties
- * As part of formal consultation, the Services must consider the direct and cumulative effects of their actions on each species covered by the incidental take permit
- * The Services actions must not result in adverse modification of listed species' critical habitat - which for the marbled murrelet includes each of the six old growth forest stands and all of the land between and connecting these stands on PALCO property
- * In order for the marbled murrelet to survive and recover, the PALCO HCP must result in maintenance of all occupied nesting habitat on PALCO lands
- * Significant levels of take of northern spotted owl pairs on PALCO lands will jeopardize the survival and recovery of the owl
- * If any unlisted species are to be included within the scope of the ITP, these species must be treated as if they are currently listed under the Endangered Species Act
- * The Services' "no surprises" policy should not be applied here as it precludes the Services from ensuring the survival and recovery of currently and subsequently listed species in direct violation of the ESA
- * PALCO's fundamental disregard for the law militates against issuance of an ITP

These issues are discussed in detail below.

II. REQUIREMENTS FOR PUBLIC INVOLVEMENT

The U.S. Fish & Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS) (collectively hereafter "the Services") are obligated to provide at least a thirty day comment period on the HCP and accompanying NEPA documentation. (16 U.S.C. § 1539(c); 50 C.F.R. § 17.22, 17.32(b)(1)(ii).) However, given the scope, complexity and significance of the issues and the degree of public controversy involved in this case, the Services should provide, at a minimum, a 90 day comment period, to correspond with the 90 day public comment period required for PALCO's Sustained Yield Plan (which will accompany the HCP) pursuant to California Forest Practice Rule 1091.10.

In addition, the ESA gives the Services wide discretion to impose additional requirements on an ITP applicant as part of a complete application. (See 16 U.S.C. § 1539(a)(2)(A)(iv); 50 C.F.R. §§ 17.22(b)(1)(iii)(D), 17.32(b)(1)(iii)(C)(4).) Given that the PALCO

HCP will significantly affect public trust resources and the community quality of life, and in light of the degree of public interest in and controversy surrounding the Headwaters forest issue, it is entirely appropriate for the Services to require PALCO to undergo an expanded public involvement process, through public meetings and workshops, while the draft HCP is being developed.

III. LEGAL AND BIOLOGICAL STANDARDS APPLICABLE TO PALCO HCP

A. The Endangered Species Act's Overriding Conservation Purpose.

The fundamental purpose of the ESA is to conserve endangered and threatened species and the ecosystems upon which they depend for survival. (16 U.S.C. § 1531(b).) "Conserve" is defined extremely broadly as "the use of all methods and procedures which are necessary to bring any endangered . . . and threatened species to the point at which the measures provided by [the ESA] are no longer necessary." (16 U.S.C. § 1532(3).) Thus, the ESA's primary goal is to recover endangered and threatened species, a goal which the ESA seeks to achieve above all others. As the U.S. Supreme Court stated in T.V.A. v. Hill, 437 U.S. 153, 184 (1978) (recently reaffirmed by Babbitt v. Sweet Home Chapter of Communities, 115 S. Ct. 2407 (1995)): "the plain intent of Congress was to halt and reverse the trend toward species extinction, whatever the cost." Because this recovery goal is the cornerstone of the ESA, all ESA implementation actions must be construed in light of it.

B. Absent An ITP, PALCO Is Prohibited From Logging Unentered Or Residual Old Growth Forest Stands.

The ESA strictly prohibits any person, including any private corporation, from "taking" an endangered and threatened species. (16 U.S.C. §§ 1532(13); 1538(a)(2)(B); 50 C.F.R. § 17.31(a).) "Take" is defined as to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect [a listed species], or to attempt to engage in any such conduct." (16 U.S.C. § 1532(19).) "Harm" in turn is defined by a USFWS regulation to proscribe habitat destruction or modification that kills or injures listed species. (50 C.F.R. § 17.3.) Injury can occur through habitat modifications that impair a species' essential behavioral patterns, including breeding, feeding and sheltering. (Id.)

Significantly, this definition of harm was recently upheld by the U.S. Supreme Court "[g]iven Congress' clear expression of the ESA's broad purpose to protect endangered and threatened wildlife." (Babbitt v. Sweet Home, 115 S. Ct. at 2414.) The Supreme Court has acknowledged that the section 9 take prohibition and the section 10 ITP process are inextricably linked. In upholding the USFWS' harm regulation in Babbitt v. Sweet Home, the Court stated that section 10 supports the USFWS' "conclusion that activities not intended to harm an endangered species, such as habitat modification, may constitute unlawful takings under the ESA unless the [USFWS] permits them." (Id.) Thus, PALCO is prohibited by the ESA from destroying or modifying habitat for listed old-growth dependent species in ways that

significantly impair their essential behavioral patterns, absent a permit to do so.

The general legal principles governing take do not necessarily answer the question of what degree or extent of habitat modification constitutes a prohibited "take" of an endangered or threatened species in a given situation. However, EPIC's successful enforcement of the take prohibition through the ESA's citizen suit provision has resulted in an unprecedented level of specific judicial guidance on what constitutes "take" of marbled murrelets occupying this region. In Marbled Murrelet v. Pacific Lumber Company, 880 F. Supp. 1343 (N.D. Cal. 1995), the District Court permanently enjoined PALCO from implementing its proposed logging of the Owl Creek grove, one of the six remaining old-growth stands in the Headwaters region, on the ground that the proposed logging would cause a "take" of marbled murrelets in violation of the ESA. The court cited the following key facts, among others, in support of this conclusion:

- (1) The proposed logging of the old growth trees on the site "will significantly impair the marbled murrelets' breeding behavior," thus decreasing the chance of successful nesting.
- (2) Removal of these old growth trees "will result in loss of a substantial portion of the nesting opportunities" for murrelets returning to the area from sea to nest. Returning murrelets will become disoriented, and will be subjected to increased competition. Nest sites that do remain will be degraded and substandard. As a consequence, many murrelets will likely fail to find suitable nest sites, and those that do may not be able to successfully raise their young.
- (3) The resulting open and fragmented nest canopy also will significantly increase the likelihood of avian predation.
- (4) Logging even outside the nesting season will "harm" murrelets in violation of the ESA.

This decision was recently upheld by the Ninth Circuit Court of Appeals because "an imminent threat of future harm [to a listed species] is sufficient for the issuance of an injunction under the ESA," and impaired future breeding can constitute such harm. (Marbled Murrelet v. Pacific Lumber Company, 83 F.3d 1060 (9th Cir. 1996).)

In addition, as scientific research has continued it has become clear that a take of murrelets is likely to occur not only by logging of unentered old growth stands, but even by logging of residual old growth stands. On July 15, 1996, the Pacific Seabird Group (PSG)¹

¹ The Pacific Seabird Group (PSG) is the international organization which provides scientific guidance on issues relating to the marbled murrelet. The PSG drafts the inland survey protocol used to identify murrelet breeding sites. The judgment of the PSG reflects the best available scientific evidence on murrelet survey protocol.

informed the USFWS that "any stand with a residual tree component or small patches of suitable habitat should be considered nesting habitat." The PSG's conclusion is based on recent published studies which indicate that murrelets can also nest in larger residual trees, even where such trees occur in densities of less than one tree per acre. Also, large diameter trees do not always need to be present for a stand to contain potential murrelet nesting habitat. Instead, research shows that the presence of potential nesting platforms is significantly more important than tree diameter in predicting murrelet presence in the area. The PSG has determined that errors in assessing the suitability of habitat could greatly affect the murrelet's chances of survival and recovery.

Therefore, PALCO cannot legally harvest any old growth or residual old growth on its property without obtaining USFWS' approval of an ITP, otherwise it will run afoul of the ESA's take prohibition. This fact holds true regardless of the Headwaters forest agreement.

C. Federal Agency Obligations Under the ESA.

In addition to the express limitations on PALCO's logging which have resulted from successful citizen enforcement of the ESA's take prohibition, issuance of an ITP to PALCO may only be granted where such a permit will contribute to the species recovery. The Services throughout this process have several mandatory obligations under the ESA. First, the Services must be able to make each of the required findings for issuance of an ITP. (16 U.S.C. § 1539(a)(2)(B).) Second, the Services must ensure that their actions neither: (1) jeopardize the continued existence of any listed species; nor (2) adversely modify or destroy designated critical habitat. (16 U.S.C. § 1536(a)(2).) Third, and perhaps most importantly, in carrying out these duties, the Services must rely on the best available science. (16 U.S.C. § 1536(a)(2).) Finally, the Services have a fundamental, overriding obligation to implement the ESA's basic conservation mandate: to utilize their authorities in furtherance of the ESA's conservation (i.e. recovery) purpose. (16 U.S.C. § 1536(a)(1); Section 7(a)(1).) This obligation further reinforces the requirement that the PALCO HCP contribute to the recovery of the murrelet, northern spotted owl, coho salmon, and other covered species.

1. Standards for Incidental Take Applications and Habitat Conservation Plans.

In general, as the Headwaters forest agreement recognizes, the PALCO HCP must be prepared "in full compliance with the requirements of the ESA," and the Services "must make their decision on the [ITP application] based on sound science and in full compliance with the ... ESA." In fact, the ESA requires the Services to make their decision based on the "best available science." Further, the Services cannot issue an ITP under the ESA unless they can make all of the required findings. (16 U.S.C. § 1539(a)(2)(B).) We focus below on the second and third ITP issuance criteria.

a. Mitigation requirements.

An ITP applicant must minimize and mitigate the impacts of the taking to the maximum extent practicable. (16 U.S.C. § 1539(a)(2)(B)(ii).) We will strongly object to any attempt by PALCO to obtain "mitigation credit" for the Headwaters and Elk Head groves, which will be acquired by the federal and state governments as part of the Headwaters forest agreement. Since that acquisition is a related but distinct fair market value transaction for which PALCO is being handsomely compensated, sale of these two groves cannot possibly qualify as "mitigation." In fact, we expect that in order to comply with the law PALCO will offer, and the Services will require, mitigation entirely separate from these two groves for any adverse impacts caused by take of endangered species.

b. The PALCO HCP must contribute to recovery of covered species.

The requirement that the taking authorized by an ITP and HCP not appreciably reduce the likelihood of survival and recovery of listed species in the wild (16 U.S.C. § 1539(a)(2)(B)(iv)) is nearly identical to the duty to avoid jeopardy to listed species. Therefore, that discussion is presented in more detail below.²

c. Special ITP requirements applicable to NMFS.

With respect to coho salmon and other species under NMFS' jurisdiction, in determining whether to issue an ITP, NMFS must consider the following:

(1) the status of the affected species or stocks; (2) the potential severity of direct, indirect and cumulative impacts on the species or stocks and habitat as a result of the proposed activity; (3) the availability of effective monitoring techniques; (4) the use of the best available technology for minimizing or mitigating impacts; and (5) the views of the public, scientists and other interested species knowledgeable of the species or stocks. (50 C.F.R. § 222.22(c)(1).)

2. Section 7 Requirements for Federal Agency Actions.

a. The Services must engage in formal consultation.

All federal agencies have a mandatory duty to ensure that their actions do not: (1) jeopardize the continued existence of any listed species; and (2) adversely modify or destroy designated critical

² See, e.g., House Rpt. No. 97-567, 97th Cong., 2d Sess., p. 31 ("[t]he Secretary would base his determination on whether or not to grant [an ITP] under the same standard as found in Section 7(a)(2) of the Act"); see also 50 C.F.R. § 402.02 (regulatory definition of "jeopardy" identical to third issuance criterion for section 10(a) ITP).

habitat. (16 U.S.C. § 1536(a)(2); Section 7(a)(2).) Consequently, prior to issuing the ITP, the Services must engage in formal consultation to ensure that issuance of the ITP (a federal agency action) will not violate either of the agencies' section 7 duties. As part of this consultation, the Services must consider the direct and cumulative effects of the agency action on each species covered by the permit. (50 C.F.R. § 402.14(g).) In making their determinations, the Services also must rely on the best available science with respect to each covered species. (50 C.F.R. §§ 402.14(d), 402.14(g)(8).)

b. The Services actions must not adversely modify critical habitat.

The Services' duty to avoid adverse modification or destruction of critical habitat is highly significant in this instance. The USFWS has designated each of the six critical old growth forest stands and all of the land between and connecting these stands on PALCO property as critical habitat for the murrelet. USFWS regulations state that adverse modification or destruction of critical habitat will occur when the proposed activity will directly or indirectly alter habitat in a manner which diminishes its value for the survival and recovery of a listed species. (50 C.F.R. § 402.02.) Such alterations include, but are not limited to, those adversely modifying essential physical or biological features that formed the basis for designating the critical habitat in the first instance. (*Id.*) The essential features, or "constituent elements," of critical habitat include "roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinators, geological formation, vegetation . . . and soil types." (50 C.F.R. § 424.12.)

In this case, PALCO lands were included within the critical habitat designation because they "provide essential elements" to the species' survival and recovery, including habitat features that support nesting, roosting and other essential behaviors. Specifically, primary constituent habitat elements include: (1) trees with potential nesting platforms; and (2) forested areas within one half mile of individual trees with nesting platforms. (61 Fed. Reg. 26256 (May 24, 1996).) The marbled murrelet critical habitat designation includes, but is not limited to, Owl Creek grove, Allan Creek grove, Shaw Creek grove, Yager Creek grove, Bell/Lawrence Creek groves, Headwaters grove and Elk Head Springs grove, and all of the lands between and connecting these stands. Therefore, any modification or destruction of these areas, will constitute a violation of section 7. Significantly, the Headwaters forest agreement itself recognizes that the HCP must be "consistent with the regulations applicable to the critical habitat designated for the marbled murrelet."

c. The Services are prohibited from jeopardizing the survival or recovery of listed species.

In light of the landscape scale and precedent-setting nature of the PALCO HCP, an ITP cannot be approved in this case unless it affirmatively contributes to the recovery of covered species. In addition, the HCP must be consistent with the draft recovery plans for

the marbled murrelet and the northern spotted owl.

The best available scientific evidence and the Marbled Murrelet Recovery Plan demonstrate that in order for the marbled murrelet to survive and recover, the PALCO HCP must result in maintenance of all occupied nesting habitat on PALCO lands. "Unless the marbled murrelet population is kept at a sustainable level, without further loss of habitat, it is very likely that the marbled murrelet will slip towards extinction." (See 880 F. Supp. at 1348.) Given the precarious state of both of the murrelet and the northern spotted owl, it is readily apparent that, if the ITP authorizes any harvest of old growth and residual old growth trees, the fundamental conservation standard of the ESA will not be met.

1. Marbled murrelet

The marbled murrelet recovery plan and associated conservation assessment starkly conclude that, even assuming no further habitat loss, the marbled murrelet population is currently declining at an estimated rate of 5% per year, and does not have a fecundity rate sufficient to sustain the population. (Draft Marbled Murrelet Recovery Plan, USFWS Region 1, July 1995, p. 4; Ralph et al., Ecology and Conservation of the Marbled Murrelet, USFS, Feb. 1995.) Currently, murrelet fecundity (the number of female young produced annually per adult female) ranges from .06 to .18. (Proposed Critical Habitat Designation for the Marbled Murrelet, 60 Fed. Reg. 40895 (Aug. 10, 1995).) For the murrelet population to remain stable or increase, fecundity levels would need to be between .20 and .46. (Id.; Recovery Plan, p. 4.) Further, murrelet adults have only an estimated .845 annual probability of survivorship. (Id.)

Historically, the murrelet population was estimated to be around 60,000 birds; the current California population is estimated to be at most 2,000 birds. (Final Rule Listing Marbled Murrelet as a Threatened Species, 57 Fed. Reg. 45329 (Oct. 1, 1992); Recovery Plan, p. 11.) Even more startling, the current population estimates may not even reflect the true state of the population, since a percentage of this population may consist of non-breeding adults. (Recovery Plan, p. 15.)

The primary cause of this precipitous decline in the murrelet population is the loss, degradation and fragmentation of late seral stage (old growth) forests, which the murrelets use for nesting, roosting and foraging. (60 Fed. Reg. 40895; 57 Fed. Reg. 45330, 45336.) The existing colonies of birds correspond to the last remaining tracts of old growth forests on public and private land. (60 Fed. Reg. 40894; 57 Fed. Reg. 45329.) Significant gaps in population distribution are found where little or no old growth forests exist. (Id.)

Commercial logging has destroyed 96% of the original coastal old growth forest murrelet habitat in California. (Decl. of Steven

Singer, A.R. p. 722.)³ Only 70,000 acres of the original 2 million acres remains. (*Id.* at 723.) Given current forest management practices on public and private lands, this habitat loss and consequent population decline is predicted to continue throughout the forested range of the species. (57 Fed. Reg. 45334.) Trees "typically require 200-250 years to attain the attributes necessary to support marbled murrelet nesting." (60 Fed. Reg. 40893.) Replacement old growth of sufficient age to support nesting habitat will not mature until the year 2040. (Recovery Plan, p. 7.)

Significantly, even the presence of suitable nesting habitat does not necessarily guarantee reproductive success. Murrelets only lay one egg per pair, and not all adult murrelets reproduce every year. (57 Fed. Reg. 45329, 45336.) Moreover, murrelets have a high rate of reproductive failure. Their eggs and young are highly susceptible to predators, including ravens, hawks and jays. (*Id.*) Nest failure has been documented to be a whopping 64%, 57% of which was due to nest predation. (60 Fed. Reg. 40895.) Nest failure is particularly likely on forest edges. (*Id.*; Recovery Plan, p. 34.) The quality of the old growth habitat also can affect murrelet nesting success. (60 Fed. Reg. 40893.) Murrelet population densities are higher the greater the percentage of old growth in the area, and the greater the density of old growth cover. (*Id.*; 57 Fed. Reg. 45329.)

Murrelets are directly, adversely affected by logging activities in a number of ways. Such activities remove nest trees or destroy nest platforms, resulting in death or injury to individual birds and substantially decrease the likelihood of breeding success by causing the birds to try to locate other suitable nest sites, not always successfully. (Decl. of Kim Nelson, A.R. p. 716; 57 Fed. Reg. 45334.) Murrelets usually exhibit high "site fidelity," that is, they return to the same location (stand and tree) year after year to nest. (Recovery Plan, p. 5.) Therefore, destruction of a nest site (even when the bird is not in the tree) can and has been known to delay nesting attempts by affected individual birds for up to several years. (Decl. of Kim Nelson, A.R. p. 717.) Logging activities also open up the forest canopy and create gaps in the forest that further reduce murrelet breeding success by rendering them susceptible to predators and harsh weather. (Decl. of Kim Nelson, A.R. pp. 716-17; Recovery Plan, pp. 5, 7.) Nesting success has been documented to substantially decrease along forest edges. (60 Fed. Reg. 40895; Recovery Plan, p. 34.)

Of the remaining murrelet populations in California, the population in south-central Humboldt County is most vulnerable to complete extirpation. (Decl. of Steve Singer, A.R. p. 723.) The Headwaters Forest is one of the last remaining intact old growth stands that provides suitable murrelet nesting habitat in the region. (*Id.*) Given the tenuous existence of murrelets, "every bird, every nesting site, and every site used for nesting-related behavior of the

³ Citations to "A.R." are to the administrative record before the California Board of Forestry for PALCO's appeal of the California Department of Forestry's denial of THP 1-95-099 HUM (Headwaters grove), heard on March 5, 1996.

murrelet is important" to the continued survival of the murrelet in Humboldt County. (Decl. of Steve Singer, A.R. p. 723.) Further, this habitat is important to the survivability of the entire species. (Recovery Plan, p. 79; Marbled Murrelet, 880 F. Supp. at 1348, 1366.)

In sum, in order for the marbled murrelet to survive and recover, the PALCO HCP must result in no reduction in murrelet nesting habitat, no destruction of unentered or residual old-growth stands occupied by murrelet, and enhancement of old growth characteristics through low-impact logging methods outside occupied murrelet sites. If these basic requirements are not met, the HCP will not meet the survival and recovery standard of the ESA.

2. Northern spotted owl

The northern spotted owl likewise is in serious trouble. The owl is currently experiencing astonishing levels of take throughout the Pacific Northwest on public and private lands. This take has occurred and will continue to occur through implementation of the Northwest Forest Plan; the "salvage logging rider," section 2001 of P.L. 104-19, 109 Stat. 194; numerous HCPs covering millions of acres throughout the Northwest; and the proposed section 4(d) rule authorizing incidental take of the owl, anticipated to be issued in the summer of 1997. (60 Fed. Reg. 9484 (Feb. 17, 1995).) The owl cannot possibly sustain this level of take and be expected to survive, let alone recover.

Indeed, the draft recovery plan for the northern spotted owl concluded even in 1992 that:

- (1) the population of northern spotted owls across their range was in decline and the rate of decline was accelerating; and
- (2) there was a linearly declining survival probability of adult females.

(App. C, Northern Spotted Owl Draft Recovery Plan, 1992.) Likewise, in 1994, several preeminent owl population biologists concluded that the rate of population decline was 4.5% per year across the owl's range, and that the rate of decline was continuing to accelerate at a rate of 1% per year. (Lande, et al., 1994.)

Since that time, however, the owl's biological circumstances have become significantly worse, not better. At least fifteen HCPs covering several million acres, including high quality spotted owl habitat, have been approved, are awaiting approval, or are currently being drafted throughout the Pacific Northwest, including California. These HCPs authorize or contemplate unsustainable levels of take of hundreds of spotted owl pairs. The Plum Creek HCP in Washington State, for example, allows two-thirds of the spotted owl home sites on Plum Creek property to be harvested over the next twenty years, and the remaining one third to be harvested thereafter. In addition, numerous green tree and salvage timber sales have been authorized on public lands throughout the Pacific Northwest under the salvage logging rider. These timbers sales have been executed without even the most basic environmental safeguards, and have resulted in

clearcutting and other harvesting of owl nesting, roosting and foraging habitat. Because salvage rider timber sales have not undergone any detailed environmental review, it is not even known how many spotted owl pairs have been adversely affected by these activities.

The proposed 4(d) rule for the northern spotted owl will greatly exacerbate the cumulative effects of this unsustainable level of take of an already depleted and declining population by virtually eliminating incidental take restrictions on private lands. According to the USFWS own statistics, California is home to approximately 1/3 of all northern spotted owls. Approximately 25% of owl site centers are on non-federal lands, and the vast majority of these are in California. (60 Fed. Reg. 9495.) The USFWS recognizes that non-federal lands are essential to the survival of the species under current forest management practices. (60 Fed. Reg. 9495.) In addition, over 1/3 of California's owl population resides in the California Coastal Province. In this region, there are very few acres of federal land, emphasizing the need for protection of the owl on non-federal lands. (60 Fed. Reg. 9494.)

Even in the California Klamath Province, where federal lands play a much more dominant role in providing habitat, the USFWS recognizes that populations have continued to decline since listing. (60 Fed. Reg. 9495.) In the California Cascades Province, where federal and non-federal lands are evenly intermixed, owl dispersal is hampered by the decimation of owl habitat. Significantly, this area provides "the demographic and genetic linkage" between northern and California spotted owl populations, a linkage that the Service recognizes will remain in jeopardy for the next several decades. (*Id.*)

Therefore, given that federal lands will likely take many years or even decades to increase the amount of suitable habitat, any release of private lands from current take prohibitions must be considered detrimental.

Based on this evidence, it is difficult to imagine a scenario under which the PALCO HCP could authorize significant take of northern spotted owl pairs and still meet the survival and recovery standard of section 10(a).

d. Coverage of unlisted species and regulatory assurances.

If any unlisted species are to be "covered" by (i.e. included within the scope of) the ITP, these species must be treated as if they are listed. (House Conf. Rpt. No. 97-835, 97th Cong, 2d Sess., p. 30; Endangered Species Habitat Conservation Planning Handbook, USFWS and NMFS, Nov. 1996, p. 4-4.) In other words, the HCP must meet section 10(a) standards for each covered species. There also must be a justifiable scientific basis for species coverage determinations. The USFWS' policy of providing coverage to named and unnamed species that occupy the same habitat as listed species, without any scientific justification or even analysis, is impermissible and inconsistent with the ESA.

Furthermore, we strongly object to the proposed inclusion of any "no surprises" assurances in the PALCO HCP implementing agreement. The Services' "no surprises" policy is in direct violation of the ESA, as it precludes the Services from ensuring the survival and recovery of currently and subsequently listed species, contrary to the mandates of sections 7, 9 and 10 of the ESA.

The no surprises policy limits both the circumstances under which the federal government may require additional mitigation measures, as well as the type of mitigation that may be required. Under this policy, if new information or changed circumstances reveal that the terms and conditions of the HCP are inadequate to ensure the continued survival and recovery of the species covered by the plan, the federal government may nevertheless be unable to require additional mitigation sufficient to protect these species, unless it pays for such mitigation itself. However, the government has not guaranteed that adequate funding will be available to do so. Thus, the policy forecloses the Services from using "all methods and procedures necessary" to conserve species and from insuring that its actions will not jeopardize listed species or adversely affect critical habitat, in violation of its section 7 duties. Further, the policy prevents the federal government from ensuring that an HCP fully mitigates all impacts to and does not jeopardize the continued existence of listed species under section 10.

D. PALCO's Fundamental Disregard For the Law Militates Against Issuance of an ITP.

Indeed, we seriously question whether PALCO is entitled to an ITP at all. Under 50 C.F.R. Parts 13 and 220, the Services cannot issue an ITP if the applicant fails to demonstrate a valid justification for the permit and a showing of responsibility. (50 C.F.R. § 13.21(a)(3); 50 C.F.R. § 220.21(b)(3).) On numerous prior occasions, PALCO has demonstrated not only a showing of irresponsibility, but a fundamental disregard for the law.

First, on June 18, 1992, PALCO commenced logging the virgin Owl Creek grove, without allowing state and federal agencies an opportunity to review marbled murrelet surveys, to impose mitigation measures, or to engage in consultation as required under the ESA and the California Endangered Species Act prior to the initiation of harvest. PALCO stopped logging three days later only after being threatened with a "stop work order" and legal proceedings by the California Department of Forestry. In three days of "weekend logging," PALCO cut down and removed more than 1 to 2 million board feet of virgin redwood forest timber worth more than a million dollars. During this misadventure, PALCO was able to log five separate areas of Owl Creek, significantly splintering the grove and fracturing intact occupied old growth habitat.

Subsequent marbled murrelet surveys indicated that substantial destruction of the resident population had resulted. While behavior of marbled murrelets observed in the timber harvest area during April of 1992, conformed with the definition of "occupied behavior" according to the previous PSG protocol, there were no detections of marbled murrelets in the area following the June harvest.

Then, on November 24, 1992, the eve of the Thanksgiving holiday, USFWS expressly instructed PALCO that no operations were to be conducted in Owl Creek because a federal permit to "take" marbled murrelets could not be issued until PALCO submitted an HCP. USFWS warned PALCO that any operations without such permit would result in an illegal "take," in violation of the ESA. PALCO expressly informed USFWS that no harvesting was planned or would occur. However, just three days later, on November 27, 1992, in direct violation of the ESA and its agreement with the USFWS, PALCO began logging the Owl Creek grove quickly and surreptitiously over the holiday weekend. Over a four day holiday weekend logging spree, PALCO was able to cut down approximately \$1,000,000 worth of ancient forest containing occupied murrelet habitat critical to the species' survival.

Finally, in 1995, a federal district court not only found PALCO in violation of the law, but also noted its blatant manipulation of scientific evidence. In the Marbled Murrelet case, after an eight day court trial, the district court made the following findings of fact:

- (1) "Pacific Lumber administered its marbled murrelet surveys . . . with the intent to either avoid detecting marbled murrelets or, to the extent that making detections could not be helped, to grossly understate the marbled murrelets' presence;"
- (2) PALCO's survey data is "highly suspect and patently unreliable." The data was made by PALCO consultants whose scientific opinions were "unreliable" and whose testimony "lack[ed] objectivity and credibility," and specifically lacked credibility with respect to issues relating to habitat suitability.
- (3) The original marbled murrelet survey forms themselves were "reworked and withheld" from the government, thus concealing significant information.
- (4) PALCO and its consultants have not followed the PSG protocol in conducting its marbled murrelet surveys.


Given this company's repeated showing of irresponsibility, we believe that the Services cannot make the required findings for issuance of an ITP to PALCO under 50 C.F.R. §§ 13.21 and 220.21.

III. CONCLUSION

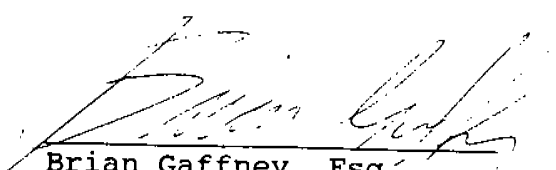
In sum, nothing less than a biologically based HCP is acceptable to us. The law clearly mandates that the U.S. Fish and Wildlife Service and the National Marine Fisheries Service insure that their actions contribute to the recovery of listed species. If PALCO is unable or unwilling to submit an ITP and HCP which meets all of the law's requirements, we believe that the Services have a duty to deny the ITP application. Our intent is not to derail the Headwaters forest agreement, but to guarantee that the agreement and the permits and plans approved thereto meet the letter and the spirit of the law.

Thank you for your careful consideration of our views.

Sincerely,



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cc: Senator Diane Feinstein
Senator Barbara Boxer
State Senator Tom Hayden
State Senator Byron Sher
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Mr. Phil Dietrich, USFWS
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